

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
REPLY BRIEF**

76-2021

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LYMAN T. SHEPARD,

Appellant,

-against-

UNITED STATES BOARD OF PAROLE,

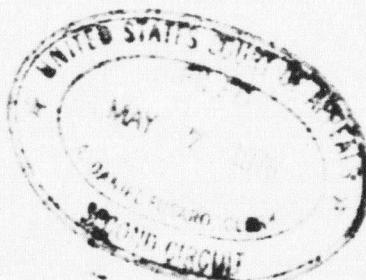
Appellee.

Docket No. 76-2021

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REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK



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I

The Government in its answering brief first argues that a parolee who commits a new crime is not entitled to a hearing at any time. The premise according to the Government is that he has no interest to protect and therefore he is entitled to no process.

The Government's argument is contrary to the specific language and principles of Morrissey v. Brewer, 408 U.S. 471 (1972), as reiterated in Gagnon v. Scarpelli, 411 U.S. 778

(1973). The interest to be protected is the liberty that the parolee already enjoys by virtue of the grant of parole to him.

Even though the revocation of parole is not a part of the criminal prosecution, we held that the loss of liberty entailed is a serious deprivation requiring that the parolee be accorded due process.

(Gagnon v. Scarpelli,
supra, 411 U.S. at 781)

Liberty is protected by due process requiring a hearing:

Petitioner does not contend that there is any difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation, nor do we perceive one. Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty. Accordingly, we hold that a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in Morrissey v. Brewer, supra.

(Id. 411 U.S. at 782)

See Arnett v. Kennedy, 416 U.S. 134, 157 (1974).

This "entitlement," as the Government would call it, in liberty recognized in Morrissey and Gagnon is not diminished by the fact that the violation of parole is a new conviction or criminal conduct rather than some other conduct. Contrary to the Government's position (See Government Brief at 15) Morrissey does not make a distinction between kinds of violative conduct and Gagnon makes that clear. In-

deed, the parolee in Gagnon engaged in new criminal conduct. Thus, Gagnon reiterates that the revocation decision has two components: a determination as to whether there was a violation, and if so, whether the parolee should be re-committed to prison. Even where the parolee has been convicted of committing another crime or has admitted the charges against him, he may have a justifiable excuse for the violation or a convincing reason why revocation is not the appropriate disposition. (411 U.S. at 787).

Since the decision to revoke considers not only the violation, but the parolee's personal and social history and characteristics as included in his file (411 U.S. at 784 and n.8), the hearing and its components are obviously necessary. The Supreme Court assumed that revocation is not an automatic consequence of a new crime when it stated:

Presumptively it may be said that counsel should be provided in cases where, after being informed of his right to request counsel the probationer or parolee makes such a request based on a timely and colorable claim . . . (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate . . .
(Id. at 790)

Nor is the interest in liberty diminished by the service of the intervening sentence for the new crime. Under 28 C.F.R. §2.53(b), the rule which governed appellant's case, the Board had available to it several alter-

natives which would have shortened the parolee's total term of custody or parole. See Peyton v. Rowe, 391 U.S. 54, 65 (1968). Thus, the Board could have removed the detainer altogether restoring the parolee to his original status as of the date of release, or execute the warrant thus granting concurrent sentences.

Under the recently enacted statute, Parole Commission and Reorganization Act, P.L. 94-233 (effective May 15, 1976), 18 U.S.C. §4214(b)(3)(8),¹ the Board may withdraw the detainer, or, if it lets the detainer stand, it must under 18 U.S.C. §4210(b)(2), decide whether all or part of the parole term shall run concurrently with the new term of incarceration.²

Under either the old rule or the new statute, the parolee's liberty is at stake, and therefore due process requires a hearing. The fact that the hearing may not yield a decision in favor of liberty, but produce a decision to revoke, is of no consequence, for the due process hearing exists to protect liberty against unfair or improper revocation and, as argued in the main brief, the opportunity to persuade the Board that revocation is im-

1 Appellant does not believe an adjudication of the new statute is necessary since the relief requested is withdrawal of the detainer and dismissal of the charges with restoration to federal parole.

2 Under the old law (18 U.S.C. §4207) no parolee received credits for street time. Under the new law (18 U.S.C. 4210) the parolee who has been convicted of a crime does not receive street time.

proper is critical. Armstrong v. Manzo, 380 U.S. 545, 552 (1965). To hold otherwise would preclude the right to an appeal or even the right to a trial in a criminal case on the ground that it might be unsuccessful for the appellant or the defendant.

The concept of liberty is broad enough to include not only the conditional freedom of probation or parole, but also "alterations" in the conditions of confinement. Cardaropoli v. Norton, 523 F.2d 990, 994 (2d Cir. 1975). Thus, in proceedings to determine whether an inmate is a serious felony offender, due process requires a hearing where the inmate is present. Id. at 996. Similarly, the presence of the detainer which creates an alteration in conditions of confinement and liberty requiring a due process hearing. The detainer precludes furloughs, transfers, participation in education or work release programs, and may preclude earlier release. These collateral limitations on the conditions of confinement require a due process hearing. See Board of Regents v. Roth, 408 U.S. 564, 574 (1972). Since a due process hearing is required, it must be a timely one.

II

Since the parolee retains the right to the conditional liberty that is parole until that right is terminated by a due process hearing, the argument that the Board might revoke it or limit it on no determinable set of facts has no significance. In fact, however, the Govern-

ment's argument insofar as it seeks to protect the Parole Board's arbitrary discretion from scrutiny, is self-defeating. The due process protections of Morrissey and Gagnon are intended to prevent "ill-considered revocation," Gagnon v. Scarpelli, supra, 411 U.S. at 786, and to encourage precise rules and consistent criteria for revocation. See Haymes v. Regan, 525 F.2d 925 (2d Cir. 1974), vacated as moot sub nom. Regan v. Johnson, 419 U.S. 1015 (1975). Thus, there is a substantive due process requirement in parole revocation, and the Board's exercise of discretion is reviewable for abuse. Earnest v. Moseley, 426 F.2d 466, 468 (10th Cir. 1970); Parole Board Cases, 388 F.2d 567, 575 (D.C. Cir. 1967); United States ex rel. Frederick v. Kenton, 308 F.2d 258 (2d Cir. 1962).

III

The fact that liberty cannot be taken without due process, distinguishes this case from Board of Regents v. Roth, supra, 408 U.S. 564, so heavily relied upon by the Government. Roth's contract provided that his teaching position would last for only a specific period with no standards for re-employment. In accordance with the contract terms, he was terminated without a hearing or explanation. The Court found that under the terms of the contract Roth had no claim to re-appointment (408 U.S. at 578).

The analogous prisoner situation to Roth's, is one involving a furlough where the release is for a limited period. Parole however, is an unlimited period of liberty unless the Board makes a finding that it should be terminated or modified. See Goss v. Lopez, 419 U.S. 565 (1975); Perry v. Sindermann, 408 U.S. 953 (1972).

IV

The Government argues that even if some process is due, what existed under the Board's rules and what is provided for in the new law is adequate.

The Board's rules, 28 C.F.R. §2.53(c) are discussed at appellant's main brief at 13-14. The procedure does not comport with the Morrissey hearing.

The new statute is also constitutionally deficient under the new statute. The record review procedure is outlined in 18 U.S.C. §4214(b). The review must be made 180 days after notification to the Parole Commission that the detainer has been lodged. The parolee shall receive notice of the review, can submit a written application containing information relative to the disposition, and can have the assistance of assigned counsel.³ No hearing is permitted, no witnesses can be called, or adverse witnesses examined,

³ See footnote 1.

and critically, no examination of the Board's file, which may affect the disposition, is permitted. Thus, the parolee may not know of all the information and facts that affected the decision and cannot direct his attention to correcting, modifying, explaining, or mitigating the information used in making the decision.⁴ Green v. McElroy, 360 U.S. 474, 496 (1959); United States v. Coplon, 185 F.2d 629, 639 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952); United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944). See also United States v. Reynolds, 345 U.S. 1, 12 (1953).

The Government relies on Matthews v. Eldridge, 44 U.S.L.W. 4224 (Sup.Ct., February 24, 1976), to support its position that the record review is enough. However, Matthews only highlights the weakness in the Government's position, for the procedures there approved for cutting off disability payments included notice, the examination of the doctors' reports involved with an opportunity for response, and full access to the information relied upon. Further, after the payments were stopped there was a full hearing and in the event of error, retroactive payments were made. Here, there is no discovery of the file, there is no subsequent full hearing, and there is no way to give retroactive prison credit.

⁴ Even the hearing granted after the completion of the intervening sentence (18 U.S.C. §4214(c)) is inadequate under Gagnon and Morrissey.

V

The Government's position is that a prompt hearing would impose a severe administrative burden on the Board. The Supreme Court has rejected such an argument where due process requires a procedure Gagnon v. Scarpelli, supra, 411 U.S. at 782 n.5. In Jones v. Johnson, Doc. No. 74-1424 (D.C.Cir. March 23, 1976) (annexed hereto), the Court found unpersuasive the argument that transportation costs would be high primarily because the Board must transport the parolee for a hearing at some point in time in any case so that an earlier transportation imposes no added burden. Id. at 30.

VI

Attention of the Court is directed to Jones v. Johnston, supra, and In Re Beattie, decided by the New York Court of Appeals. Both decisions are annexed hereto and are further support for appellant's position.⁵

CONCLUSION

For the above-stated reasons the order below should be vacated.

⁵ Jones was decided just before the filing of appellant's brief and Beattie was decided afterward.

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May 7, 1976
New York, New York



Public Law 94-233
94th Congress, H. R. 5727
March 15, 1976

An Act

To establish an independent and regionalized United States Parole Commission, to provide fair and equitable parole procedures, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Parole Commission and Reorganization Act".

UNITED STATES PAROLE COMMISSION ; PAROLE PROCEDURES, CONDITIONS, ETC.

SEC. 2. Title 18 of the United States Code is amended by repealing chapter 311 (relating to parole) and inserting in lieu thereof the following new chapter to read as follows:

Parole
Commission
and
Reorganization
Act.
18 USC 4201
note.
Repeal.

"Chapter 311—PAROLE

"See.

- "4201. Definitions.
- "4202. Parole Commission created.
- "4203. Powers and duties of the Commission.
- "4204. Powers and duties of the Chairman.
- "4205. Time of eligibility for release on parole.
- "4206. Parole determination criteria.
- "4207. Information considered.
- "4208. Parole determination proceeding; time.
- "4209. Conditions of parole.
- "4210. Jurisdiction of Commission.
- "4211. Early termination of parole.
- "4212. Aliens.
- "4213. Summons to appear or warrant for retaking of parolee.
- "4214. Revocation of parole.
- "4215. Reconsideration and appeal.
- "4216. Young adult offenders.
- "4217. Warrants to retake Canal Zone parole violators.
- "4218. Applicability of Administrative Procedure Act.

18 USC 4201.

"§ 4201. Definitions

"As used in this chapter—

"(1) 'Commission' means the United States Parole Commission;

"(2) 'Commissioner' means any member of the United States Parole Commission;

"(3) 'Director' means the Director of the Bureau of Prisons;

"(4) 'Eligible prisoner' means any Federal prisoner who is eligible for parole pursuant to this title or any other law including any Federal prisoner whose parole has been revoked and who is not otherwise ineligible for parole;

"(5) 'Parolee' means any eligible prisoner who has been released on parole or deemed as if released on parole under section 4164 or section 4205(f); and

"(6) 'Rules and regulations' means rules and regulations promulgated by the Commission pursuant to section 4203 and section 553 of title 5, United States Code.

18 USC 4164.

"§ 4202. Parole Commission created

"There is hereby established, as an independent agency in the Department of Justice, a United States Parole Commission which shall

18 USC 4202.
Membership.

March 15, 1976

Term.

be comprised of nine members appointed by the President, by and with the advice and consent of the Senate. The President shall designate from among the Commissioners one to serve as Chairman. The term of office of a Commissioner shall be six years, except that the term of a person appointed as a Commissioner to fill a vacancy shall expire six years from the date upon which such person was appointed and qualified. Upon the expiration of a term of office of a Commissioner, the Commissioner shall continue to act until a successor has been appointed and qualified, except that no Commissioner may serve in excess of twelve years. Commissioners shall be compensated at the highest rate now or hereafter prescribed for grade 18 of the General Schedule pay rates (5 U.S.C. 5332).

Compensation.

5 USC 5332
note.
18 USC 4203.

Rules and regulations.**§ 4203. Powers and duties of the Commission**

"(a) The Commission shall meet at least quarterly, and by majority vote shall—

"(1) promulgate rules and regulations establishing guidelines for the powers enumerated in subsection (b) of this section and such other rules and regulations as are necessary to carry out a national parole policy and the purposes of this chapter;

"(2) create such regions as are necessary to carry out the provisions of this chapter, but in no event less than five; and

"(3) ratify, revise, or deny any request for regular, supplemental, or deficiency appropriations, prior to the submission of the requests to the Office of Management and Budget by the Chairman, which requests shall be separate from those of any other agency of the Department of Justice.

"(b) The Commission, by majority vote, and pursuant to the procedures set out in this chapter, shall have the power to—

"(1) grant or deny an application or recommendation to parole any eligible prisoner;

"(2) impose reasonable conditions on an order granting parole;

"(3) modify or revoke an order paroling any eligible prisoner; and

"(4) request probation officers and other individuals, organizations, and public or private agencies to perform such duties with respect to any parolee as the Commission deems necessary for maintaining proper supervision of and assistance to such parolees; and so as to assure that no probation officers, individuals, organizations, or agencies shall bear excessive caseloads.

"(c) The Commission, by majority vote, and pursuant to rules and regulations—

"(1) may delegate to any Commissioner or commissioners powers enumerated in subsection (b) of this section;

"(2) may delegate to hearing examiners any powers necessary to conduct hearings and proceedings, take sworn testimony, obtain and make a record of pertinent information, make findings of probable cause and issue subpoenas for witnesses or evidence in parole revocation proceedings, and recommend disposition of any matters enumerated in subsection (b) of this section, except that any such findings or recommendations shall be based upon the concurrence of not less than two hearing examiners;

"(3) may delegate authority to conduct hearings held pursuant to section 4214 to any officer or employee of the executive or judicial branch of Federal or State government; and

"(4) may review, or may delegate to the National Appeals Board the power to review, any decision made pursuant to subparagraph (1) of this subsection except that any such decision

Review.

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so reviewed must be reaffirmed, modified or reversed within thirty days of the date the decision is rendered, and, in case of such review, the individual to whom the decision applies shall be informed in writing of the Commission's actions with respect thereto and the reasons for such actions.

"(d) Except as otherwise provided by law, any action taken by the Commission pursuant to subsection (a) of this section shall be taken by a majority vote of all individuals currently holding office as members of the Commission which shall maintain and make available for public inspection a record of the final vote of each member on statements of policy and interpretations adopted by it. In so acting, each Commissioner shall have equal responsibility and authority, shall have full access to all information relating to the performance of such duties and responsibilities, and shall have one vote.

“§ 4204. Powers and duties of the Chairman

"(a) The Chairman shall—

"(1) convene and preside at meetings of the Commission pursuant to section 4203 and such additional meetings of the Commission as the Chairman may call or as may be requested in writing by at least three Commissioners;

"(2) appoint, fix the compensation of, assign, and supervise all personnel employed by the Commission except that—

"(A) the appointment of any hearing examiner shall be subject to approval of the Commission within the first year of such hearing examiner's employment; and

"(B) regional Commissioners shall appoint and supervise such personnel employed regularly and full time in their respective regions as are compensated at a rate up to and including grade 9 of the General Schedule pay rates (5 U.S.C. 5332);

"(3) assign duties among officers and employees of the Commission, including Commissioners, so as to balance the workload and provide for orderly administration;

"(4) direct the preparation of requests for appropriations for the Commission, and the use of funds made available to the Commission;

"(5) designate three Commissioners to serve on the National Appeals Board of whom one shall be so designated to serve as vice chairman of the Commission (who shall act as Chairman of the Commission in the absence or disability of the Chairman or in the event of the vacancy of the Chairmanship), and designate, for each such region established pursuant to section 4203, one Commissioner to serve as regional Commissioner in each such region; except that in each such designation the Chairman shall consider years of service, personal preference and fitness, and no such designation shall take effect unless concurred in by the President, or his designee;

"(6) serve as spokesman for the Commission and report annually to each House of Congress on the activities of the Commission; and

"(7) exercise such other powers and duties and perform such other functions as may be necessary to carry out the purposes of this chapter or as may be provided under any other provision of law.

"(b) The Chairman shall have the power to—

"(1) without regard to section 3648 of the Revised Statutes of the United States (31 U.S.C. 529), enter into and perform

18 USC 4204.

5 USC 5332
note.

Report to
Congress.

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such contracts, leases, cooperative agreements, and other transactions as may be necessary in the conduct of the functions of the Commission, with any public agency, or with any person, firm, association, corporation, educational institution, or nonprofit organization;

"(2) accept voluntary and uncompensated services, notwithstanding the provisions of section 3679 of the Revised Statutes of the United States (31 U.S.C. 665(b));

"(3) procure for the Commission temporary and intermittent services to the same extent as is authorized by section 8109(b) of title 5, United States Code;

"(4) collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the parole process;

"(5) carry out programs of research concerning the parole process to develop classification systems which describe types of offenders, and to develop theories and practices which can be applied to the different types of offenders;

"(6) publish data concerning the parole process;

"(7) devise and conduct, in various geographical locations, seminars, workshops and training programs providing continuing studies and instruction for personnel of Federal, State and local agencies and private and public organizations working with parolees and connected with the parole process; and

"(8) utilize the services, equipment, personnel, information, facilities, and instrumentalities with or without reimbursement therefor of other Federal, State, local, and private agencies with their consent.

"(c) In carrying out his functions under this section, the Chairman shall be governed by the national parole policies promulgated by the Commission.

18 USC 4205.

§ 4205. Time of eligibility for release on parole

"(a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

"(b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

"(c) If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (d) of this section. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed

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an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) place the offender on probation as authorized by section 3651; or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from the date of original commitment under this section.

18 USC 3651.

"(d) Upon commitment of a prisoner sentenced to imprisonment under the provisions of subsections (a) or (b) of this section, the Director, under such regulations as the Attorney General may prescribe, shall cause a complete study to be made of the prisoner and shall furnish to the Commission a summary report together with any recommendations which in his opinion would be helpful in determining the suitability of the prisoner for parole. This report may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent. The Commission may make such other investigation as it may deem necessary.

Study and report,

"(e) Upon request of the Commission, it shall be the duty of the various probation officers and government bureaus and agencies to furnish the Commission information available to such officer, bureau, or agency, concerning any eligible prisoner or parolee and whenever not incompatible with the public interest, their views and recommendation with respect to any matter within the jurisdiction of the Commission.

"(f) Any prisoner sentenced to imprisonment for a term or terms of not less than six months but not more than one year shall be released at the expiration of such sentence less good time deductions provided by law, unless the court which imposed sentence, shall, at the time of sentencing, provide for the prisoner's release as if on parole after service of one-third of such term or terms notwithstanding the provisions of section 4164. This subsection shall not prevent delivery of any person released on parole to the authorities of any State otherwise entitled to his custody.

18 USC 4164.

"(g) At any time upon motion of the Bureau of Prisons, the court may reduce any minimum term to the time the defendant has served. The court shall have jurisdiction to act upon the application at any time and no hearing shall be required.

"(h) Nothing in this chapter shall be construed to provide that any prisoner shall be eligible for release on parole if such prisoner is ineligible for such release under any other provision of law.

18 USC 4206.

§ 4206. Parole determination criteria

"(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

 "(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

 "(2) that release would not jeopardize the public welfare; subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

"(b) The Commission shall furnish the eligible prisoner with a written notice of its determination not later than twenty-one days, written notice.

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excluding holidays, after the date of the parole determination proceeding. If parole is denied such notice shall state with particularity the reasons for such denial.

"(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing: *Provided*, That the prisoner is furnished written notice with particularity the reasons for its determination and a copy of the information relied upon.

"(d) Any prisoner, serving a term of imprisonment of one year or longer, who is not earlier released under the provisions of law or applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, but not more than forty-five years of each consecutive term or terms, provided, however, that he has served thirty years including any life term, whichever is earlier. *Provided, however*, That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime.

18 USC 4207.**“§ 4207. Information considered**

"In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:

- "(1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;
- "(2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;
- "(3) presentence investigation reports;
- "(4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge; and
- "(5) reports of physical, mental, or psychiatric examination of the offender.

There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available.

18 USC 4208.**“§ 4208. Parole determination proceeding; time**

"(a) In making a determination under this chapter (relating to parole) the Commission shall conduct a parole determination proceeding unless it determines on the basis of the prisoner's record that the prisoner will be released on parole. Whenever feasible, the initial parole determination proceeding for a prisoner eligible for parole pursuant to subsections (a) and (b)(1) of section 4205 shall be held not later than thirty days before the date of such eligibility for parole. Whenever feasible, the initial parole determination proceeding for a prisoner eligible for parole pursuant to subsection (b)(2) of section 4205 or released on parole and whose parole has been revoked shall be held not later than one hundred and twenty days following such prisoner's imprisonment or reimprisonment in a Federal institution, as the case may be. An eligible prisoner may knowingly and intelligently waive any proceeding.

"(b) At least thirty days prior to any parole determination proceeding, the prisoner shall be provided with (1) written notice of the time and place of the proceeding, and (2) reasonable access to a report or other document to be used by the Commission in making its determination. A prisoner may waive such notice, except that if notice is not waived the proceeding shall be held during the next regularly

Waiver.**Written notice; report.****Waiver.**

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scheduled proceedings by the Commission at the institution in which the prisoner is confined.

"(c) Subparagraph (2) of subsection (b) shall not apply to—
“(1) diagnostic opinions which, if made known to the eligible prisoner, could lead to a serious disruption of his institutional program;

“(2) any document which reveals sources of information obtained upon a promise of confidentiality; or

“(3) any other information which, if disclosed, might result in harm, physical or otherwise, to any person.

If any document is deemed by either the Commission, the Bureau of Prisons, or any other agency to fall within the exclusionary provisions of subparagraphs (1), (2), or (3) of this subsection, then it shall become the duty of the Commission, the Bureau, or such other agency, as the case may be, to summarize the basic contents of the material withheld, bearing in mind the need for confidentiality or the impact on the inmate, or both, and furnish such summary to the inmate.

"(d) (1) During the period prior to the parole determination proceeding as provided in subsection (b) of this section, a prisoner may consult, as provided by the director, with a representative as referred to in subparagraph (2) of this subsection, and by mail or otherwise with any person concerning such proceeding.

"(2) The prisoner shall, if he chooses, be represented at the parole determination proceeding by a representative who qualifies under rules and regulations promulgated by the Commission. Such rules shall not exclude attorneys as a class.

"(e) The prisoner shall be allowed to appear and testify on his own behalf at the parole determination proceeding.

"(f) A full and complete record of every proceeding shall be retained by the Commission. Upon request, the Commission shall make available to any eligible prisoner such record as the Commission may retain of the proceeding.

"(g) If parole is denied, a personal conference to explain the reasons for such denial shall be held, if feasible, between the prisoner and the Commissioners or examiners conducting the proceeding at the conclusion of the proceeding. When feasible, the conference shall include advice to the prisoner as to what steps may be taken to enhance his chance of being released at a subsequent proceeding.

"(h) In any case in which release on parole is not granted, subsequent parole determination proceedings shall be held not less frequently than:

“(1) eighteen months in the case of a prisoner with a term or terms of more than one year but less than seven years; and

“(2) twenty-four months in the case of a prisoner with a term or terms of seven years or longer.

§ 4209. Conditions of parole

"(a) In every case, the Commission shall impose as a condition of parole that the parolee not commit another Federal, State, or local crime. The Commission may impose or modify other conditions of parole to the extent that such conditions are reasonably related to—

“(1) the nature and circumstances of the offense; and

“(2) the history and characteristics of the parolee;

and may provide for such supervision and other limitations as are reasonable to protect the public welfare.

"(b) The conditions of parole should be sufficiently specific to serve as a guide to supervision and conduct, and upon release on parole the parolee shall be given a certificate setting forth the conditions of his

18 USC 4209.

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parole. An effort shall be made to make certain that the parolee understands the conditions of his parole.

"(c) Release on parole or release as if on parole may as a condition of such release require—

"(1) a parolee to reside in or participate in the program of a residential community treatment center, or both, for all or part of the period of such parole;

"(2) a parolee, who is an addict within the meaning of section 4251(a), or a drug dependent person within the meaning of section 2(q) of the Public Health Service Act, as amended (42 U.S.C. 201), to participate in the community supervision programs authorized by section 4255 for all or part of the period of parole.

18 USC 425L

A parolee residing in a residential community treatment center pursuant to subparagraph (1) or (2) of this subsection, may be required to pay such costs incident to residence as the Commission deems appropriate.

"(d) (1) The Commission may modify conditions of parole pursuant to this section on its own motion, or on the motion of a United States probation officer supervising a parolee: *Provided*, That the parolee receives notice of such action and has ten days after receipt of such notice to express his views on the proposed modification. Following such ten-day period, the Commission shall have twenty-one days, exclusive of holidays, to act upon such motion or application.

"(2) A parolee may petition the Commission on his own behalf for a modification of conditions pursuant to this section.

"(3) The provisions of this subsection shall not apply to modifications of parole conditions pursuant to a revocation proceeding under section 4214.

Petition.

18 USC 4210.

§ 4210. Jurisdiction of Commission

"(a) A parolee shall remain in the legal custody and under the control of the Attorney General, until the expiration of the maximum term or terms for which such parolee was sentenced.

"(b) Except as otherwise provided in this section, the jurisdiction of the Commission over the parolee shall terminate no later than the date of the expiration of the maximum term or terms for which he was sentenced, except that—

"(1) such jurisdiction shall terminate at an earlier date to the extent provided under section 4104 (relating to mandatory release) or section 4211 (relating to early termination of parole supervision), and

"(2) in the case of a parolee who has been convicted of a Federal, State, or local crime committed subsequent to his release on parole, and such crime is punishable by a term of imprisonment, detention or incarceration in any penal facility, the Commission shall determine, in accordance with the provisions of section 4214 (b) or (c), whether all or any part of the unexpired term being served at the time of parole shall run concurrently or consecutively with the sentence imposed for the new offense, but in no case shall such service together with such time as the parolee has previously served in connection with the offense for which he was paroled, be longer than the maximum term for which he was sentenced in connection with such offense.

"(c) In the case of any parolee found to have intentionally refused or failed to respond to any reasonable request, order, summons, or warrant of the Commission or any member or agent thereof, the jurisdiction of the Commission may be extended for the period during which the parolee so refused or failed to respond.

18 USC 4164.

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"(d) The parole of any parolee shall run concurrently with the period of parole or probation under any other Federal, State, or local sentence.

"(e) The parole of any prisoner sentenced before June 29, 1932, shall be for the remainder of the term or terms specified in his sentence, less good time allowances provided by law.

"(f) Upon the termination of the jurisdiction of the Commission over any parolee, the Commission shall issue a certificate of discharge to such parolee and to such other agencies as it may determine.

“§ 4211. Early termination of parole

"(a) Upon its own motion or upon request of the parolee, the Commission may terminate supervision over a parolee prior to the termination of jurisdiction under section 4210.

"(b) Two years after each parolee's release on parole, and at least annually thereafter, the Commission shall review the status of the parolee to determine the need for continued supervision. In calculating such two-year period there shall not be included any period of release on parole prior to the most recent such release, nor any period served in confinement on any other sentence.

"(c)(1) Five years after each parolee's release on parole, the Commission shall terminate supervision over such parolee unless it is determined, after a hearing conducted in accordance with the procedures prescribed in section 4214(a)(2), that such supervision should not be terminated because there is a likelihood that the parolee will engage in conduct violating any criminal law.

"(2) If supervision is not terminated under subparagraph (1) of this subsection the parolee may request a hearing annually thereafter, and a hearing, with procedures as provided in subparagraph (1) of this subsection shall be conducted with respect to such termination of supervision not less frequently than biennially.

"(3) In calculating the five-year period referred to in subparagraph (1), there shall not be included any period of release on parole prior to the most recent such release, nor any period served in confinement on any other sentence.

“§ 4212. Aliens

"When an alien prisoner subject to deportation becomes eligible for parole, the Commission may authorize the release of such prisoner on condition that such person be deported and remain outside the United States.

"Such prisoner when his parole becomes effective, shall be delivered to the duly authorized immigration official for deportation.

“§ 4213. Summons to appear or warrant for retaking of parolee

"(a) If any parolee is alleged to have violated his parole, the Commission may—

"(1) summon such parolee to appear at a hearing conducted pursuant to section 4214; or

"(2) issue a warrant and retake the parolee as provided in this section.

"(b) Any summons or warrant issued under this section shall be issued by the Commission as soon as practicable after discovery of the alleged violation, except when delay is deemed necessary. Imprisonment in an institution shall not be deemed grounds for delay of such issuance, except that, in the case of any parolee charged with a criminal offense, issuance of a summons or warrant may be suspended pending disposition of the charge.

18 USC 4211.

18 USC 4212.

18 USC 4213.

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"(c) Any summons or warrant issued pursuant to this section shall provide the parolee with written notice of—

- "(1) the conditions of parole he is alleged to have violated as provided under section 4209;
- "(2) his rights under this chapter; and
- "(3) the possible action which may be taken by the Commission.

"(d) Any officer of any Federal penal or correctional institution, or any Federal officer authorized to serve criminal process within the United States, to whom a warrant issued under this section is delivered, shall execute such warrant by taking such parolee and returning him to the custody of the regional commissioner, or to the custody of the Attorney General, if the Commission shall so direct.

18 USC 4214.**Hearing.**

§ 4214. Revocation of parole
"(a)(1) Except as provided in subsections (b) and (c), any alleged parole violator summoned or retaken under section 4213 shall be accorded the opportunity to have—

"(A) a preliminary hearing at or reasonably near the place of the alleged parole violation or arrest, without unnecessary delay, to determine if there is probable cause to believe that he has violated a condition of his parole; and upon a finding of probable cause a digest shall be prepared by the Commission setting forth in writing the factors considered and the reasons for the decision, a copy of which shall be given to the parolee within a reasonable period of time; except that after a finding of probable cause the Commission may restore any parolee to parole supervision if:

- "(i) continuation of revocation proceedings is not warranted, or
- "(ii) incarceration of the parolee pending further revocation proceedings is not warranted by the alleged frequency or seriousness of such violation or violations;
- "(iii) the parolee is not likely to fail to appear for further proceedings; and
- "(iv) the parolee does not constitute a danger to himself or others.

"(B) upon a finding of probable cause under subparagraph (1)(A), a revocation hearing at or reasonably near the place of the alleged parole violation or arrest within sixty days of such determination of probable cause except that a revocation hearing may be held at the same time and place set for the preliminary hearing.

Hearings.

"(2) Hearings held pursuant to subparagraph (1) of this subsection shall be conducted by the Commission in accordance with the following procedures:

Notice.**18 USC 3006A.**

"(A) notice to the parolee of the conditions of parole alleged to have been violated, and the time, place, and purposes of the scheduled hearing;

"(B) opportunity for the parolee to be represented by an attorney (retained by the parolee, or if he is financially unable to retain counsel, counsel shall be provided pursuant to section 3006A) or, if he so chooses, a representative as provided by rules and regulations, unless the parolee knowingly and intelligently waives such representation.

"(C) opportunity for the parolee to appear and testify, and present witnesses and relevant evidence on his own behalf; and

"(D) opportunity for the parolee to be apprised of the evidence against him and, if he so requests, to confront and cross-examine

adverse witnesses, unless the Commission specifically finds substantial reason for not so allowing.

For the purposes of subparagraph (1) of this subsection, the Commission may subpoena witnesses and evidence, and pay witness fees as established for the courts of the United States. If a person refuses to obey such a subpoena, the Commission may petition a court of the United States for the judicial district in which such parole proceeding is being conducted, or in which such person may be found, to request such person to attend, testify, and produce evidence. The court may issue an order requiring such person to appear before the Commission, when the court finds such information, thing, or testimony directly related to a matter with respect to which the Commission is empowered to make a determination under this section. Failure to obey such an order is punishable by such court as a contempt. All process in such a case may be served in the judicial district in which such a parole proceeding is being conducted, or in which such person may be found.

"(b)(1) Conviction for a Federal, State, or local crime committed subsequent to release on parole shall constitute probable cause for purposes of subsection (a) of this section. In cases in which a parolee has been convicted of such a crime and is serving a new sentence in an institution, a parole revocation warrant or summons issued pursuant to section 4213 may be placed against him as a detainer. Such detainer shall be reviewed by the Commission within one hundred and eighty days of notification to the Commission of placement. The parolee shall receive notice of the pending review, have an opportunity to submit a written application containing information relative to the disposition of the detainer, and, unless waived, shall have counsel as provided in subsection (a)(2)(B) of this section to assist him in the preparation of such application.

Detainer
review.
Notice;
application.

"(2) If the Commission determines that additional information is needed to review a detainer, a dispositional hearing may be held at the institution where the parolee is confined. The parolee shall have notice of such hearing, be allowed to appear and testify on his own behalf, and, unless waived, shall have counsel as provided in subsection (a)(2)(B) of this section.

"(3) Following the disposition review, the Commission may:

- "(A) let the detainer stand; or
- "(B) withdraw the detainer.

"(c) Any alleged parole violator who is summoned or retaken by warrant under section 4213 who knowingly and intelligently waives his right to a hearing under subsection (a) of this section, or who knowingly and intelligently admits violation at a preliminary hearing held pursuant to subsection (a)(1)(A) of this section, or who is retaken pursuant to subsection (b) of this section, shall receive a revocation hearing within ninety days of the date of retaking. The Commission may conduct such hearing at the institution to which he has been returned, and the alleged parole violator shall have notice of such hearing, be allowed to appear and testify on his own behalf, and, unless waived, shall have counsel or another representative as provided in subsection (a)(2)(B) of this section.

Revocation
hearing.

"(d) Whenever a parolee is summoned or retaken pursuant to section 4213, and the Commission finds pursuant to the procedures of this section and by a preponderance of the evidence that the parolee has violated a condition of his parole the Commission may take any of the following actions:

- "(1) restore the parolee to supervision;
- "(2) reprimand the parolee;

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- "(3) modify the parolee's conditions of the parole;
- "(4) refer the parolee to a residential community treatment center for all or part of the remainder of his original sentence; or
- "(5) formally revoke parole or release as if on parole pursuant to this title.

The Commission may take any such action provided it has taken into consideration whether or not the parolee has been convicted of any Federal, State, or local crime subsequent to his release on parole, and the seriousness thereof, or whether such action is warranted by the frequency or seriousness of the parolee's violation of any other condition or conditions of his parole.

Notice.

"(e) The Commission shall furnish the parolee with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the revocation hearing. If parole is revoked, a digest shall be prepared by the Commission setting forth in writing the factors considered and reasons for such action, a copy of which shall be given to the parolee.

18 USC 4215.**"§ 4215. Reconsideration and appeal**

"(a) Whenever parole release is denied under section 4206, parole conditions are imposed or modified under section 4209, parole discharge is denied under section 4211(c), or parole is modified or revoked under section 4214, the individual to whom any such decision applies may have the decision reconsidered by submitting a written application to the regional commissioner not later than thirty days following the date on which the decision is rendered. The regional commissioner, upon receipt of such application, must act pursuant to rules and regulations within thirty days to reaffirm, modify, or reverse his original decision and shall inform the applicant in writing of the decision and the reasons therefor.

"(b) Any decision made pursuant to subsection (a) of this section which is adverse to the applicant for reconsideration may be appealed by such individual to the National Appeals Board by submitting a written notice of appeal not later than thirty days following the date on which such decision is rendered. The National Appeals Board, upon receipt of the appellant's papers, must act pursuant to rules and regulations within sixty days to reaffirm, modify, or reverse the decision and shall inform the appellant in writing of the decision and the reasons therefor.

"(c) The National Appeals Board may review any decision of a regional commissioner upon the written request of the Attorney General filed not later than thirty days following the decision and, by majority vote, shall reaffirm, modify, or reverse the decision within sixty days of the receipt of the Attorney General's request. The Board shall inform the Attorney General and the individual to whom the decision applies in writing of its decision and the reasons therefor.

18 USC 4216.**"§ 4216. Young adult offenders**

"In the case of a defendant who has attained his twenty-second birthday but has not attained his twenty-sixth birthday at the time of conviction, if, after taking into consideration the previous record of the defendant as to delinquency or criminal experience, his social background, capabilities, mental and physical health, and such other factors as may be considered pertinent, the court finds that there are reasonable grounds to believe that the defendant will benefit from the treatment provided under the Federal Youth Corrections Act (18 U.S.C., chap. 402) sentence may be imposed pursuant to the provisions of such Act.

**18 USC 5005
et seq.**

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§ 4217. Warrants to retake Canal Zone parole violators

18 USC 4217.

"An officer of a Federal penal or correctional institution, or a Federal officer authorized to serve criminal process within the United States, to whom a warrant issued by the Governor of the Canal Zone for the retaking of a parole violator is delivered, shall execute the warrant by taking the prisoner and holding him for delivery to a representative of the Governor of the Canal Zone for return to the Canal Zone.

§ 4218. Applicability of Administrative Procedure Act

18 USC 4218.

"(a) For purposes of the provisions of chapter 5 of title 5, United States Code, other than sections 554, 555, 556, and 557, the Commission is an 'agency' as defined in such chapter.

5 USC 500
et seq.

"(b) For purposes of subsection (a) of this section, section 553(b)(3)(A) of title 5, United States Code, relating to rulemaking, shall be deemed not to include the phrase 'general statements of policy'.

"(c) To the extent that actions of the Commission pursuant to section 4203(a)(1) are not in accord with the provisions of section 553 of title 5, United States Code, they shall be reviewable in accordance with the provisions of sections 701 through 706 of title 5, United States Code.

"(d) Actions of the Commission pursuant to paragraphs (1), (2), and (3) of section 4203(b) shall be considered actions committed to agency discretion for purposes of section 701(a)(2) of title 5, United States Code."

SEC. 3. Section 5005 of title 18, United States Code, is amended to read as follows:

§ 5005. Youth correction decisions

"The Commission and, where appropriate, its authorized representatives as provided in section 4203(c), may grant or deny any application or recommendation for conditional release, or modify or revoke any order of conditional release, of any person sentenced pursuant to this chapter, and perform such other duties and responsibilities as may be required by law. Except as otherwise provided, decisions of the Commission shall be made in accordance with the procedures set out in chapter 311 of this title."

Ante, p. 220.

SEC. 4. Section 5006 of title 18, United States Code, is amended to read as follows:

18 USC 4201
et seq.

§ 5006. Definitions

"As used in this chapter—

"(a) 'Commission' means the United States Parole Commission;

"(b) 'Bureau' means the Bureau of Prisons;

"(c) 'Director' means the Director of the Bureau of Prisons;

"(d) 'youth offender' means a person under the age of twenty-two years at the time of conviction;

"(e) 'committed youth offender' is one committed for treatment hereunder to the custody of the Attorney General pursuant to sections 5010(b) and 5010(e) of this chapter;

"(f) 'treatment' means corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders; and

"(g) 'conviction' means the judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere."

SEC. 5. Sections 5007, 5008, and 5009 of title 18, United States Code, are repealed.

Repeal.

SEC. 6. Section 5014 of title 18, United States Code, is amended to read as follows:

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18 USC 5014.

“§ 5014. Classification studies and reports

“The Director shall provide classification centers and agencies. Every committed youth offender shall first be sent to a classification center or agency. The classification center or agency shall make a complete study of each committed youth offender, including a mental and physical examination, to ascertain his personal traits, his capabilities, pertinent circumstances of his school, family life, any previous delinquency or criminal experience, and any mental or physical defect or other factor contributing to his delinquency. In the absence of exceptional circumstances, such study shall be completed within a period of thirty days. The agency shall promptly forward to the Director and to the Commission a report of its findings with respect to the youth offender and its recommendations as to his treatment. As soon as practicable after commitment, the youth offender shall receive a parole interview.”

Sec. 7. Section 5017(a) of title 18, United States Code, is amended to read as follows:

“(a) The Commission may at any time after reasonable notice to the Director release conditionally under supervision a committed youth offender in accordance with the provisions of section 4206 of this title. When, in the judgment of the Director, a committed youth offender should be released conditionally under supervision he shall so report and recommend to the Commission.”

Sec. 8. Section 5020 of title 18, United States Code, is amended to read as follows:

“§ 5020. Apprehension of released offenders

“If, at any time before the unconditional discharge of a committed youth offender, the Commission is of the opinion that such youth offender will be benefited by further treatment in an institution or other facility the Commission may direct his return to custody or if necessary may issue a warrant for the apprehension and return to custody of such youthful offender and cause such warrant to be executed by a United States probation officer, an appointed supervisory agent, a United States marshal, or any officer of a Federal penal or correctional institution. Upon return to custody, such youth offender shall be given a revocation hearing by the Commission.”

Sec. 9. Chapter 402 of title 18, United States Code, is amended by deleting the term “division” whenever it appears therein and inserting in lieu thereof the word “Commission”.

Sec. 10. The table of sections for chapter 402 of title 18, United States Code, is amended to read as follows:

“See.
 “5005. Youth correction decisions.
 “5006. Definitions.
 “5010. Sentence.
 “5011. Treatment.
 “5012. Certificate as to availability of facilities.
 “5013. Provision of facilities.
 “5014. Classification studies and reports.
 “5015. Powers of Director as to placement of youth offenders.
 “5016. Reports concerning offenders.
 “5017. Release of youth offenders.
 “5018. Revocation of Commission orders.
 “5019. Supervision of released youth offenders.
 “5020. Apprehension for released offenders.
 “5021. Certificate setting aside conviction.
 “5022. Applicable date.
 “5023. Relationship to Probation and Juvenile Delinquency Acts.
 “5024. Where applicable.
 “5025. Applicability to the District of Columbia.
 “5026. Parole of other offenders not affected.”

Ante, p. 223.18 USC 5005
et seq.

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SEC. 11. Section 5041 of title 18, United States Code, is amended to read as follows:

“§ 5041. Parole

“A juvenile delinquent who has been committed may be released on parole at any time under such conditions and regulations as the United States Parole Commission deems proper in accordance with the provisions in section 4206 of this title.”

Sec. 12. Whenever in any of the laws of the United States or the District of Columbia the term “United States Parole Board”, or any other term referring thereto, is used, such term or terms, on and after the date of the effective date of this Act, shall be deemed to refer to the United States Parole Commission as established by the amendments made by this Act.

Sec. 13. Section 5108(c)(7) of title 5, United States Code, is amended to read as follows:

“(7) the Attorney General, without regard to any other provision of this section, may place a total of ten positions of warden in the Bureau of Prisons in GS-16;”.

Sec. 14. Section 3655 of title 18, United States Code, relating to duties of probation officers, is amended by striking out “Attorney General” in the last sentence and inserting in lieu thereof “United States Parole Commission”.

Sec. 15. There is hereby authorized to be appropriated such sums as are necessary to carry out the purposes of the amendments made by this Act.

Sec. 16. (a) There are hereby transferred to the Chairman of the United States Parole Commission, all personnel, liabilities, contracts, property and records as are employed, held, used, arising from, available or to be made available of the United States Board of Parole with respect to all functions, powers, and duties transferred by this Act to the United States Parole Commission.

(b) This Act shall take effect sixty days after the date of enactment, except that the provisions of section 4205(h) of this Act shall take effect one hundred twenty days after the date of enactment.

(c) Each person holding office as a member of the United States Board of Parole on the day before the effective date of the Parole Commission and Reorganization Act shall be a Commissioner whose term as such shall expire on the date of the expiration of the term for which such person was appointed as a member of the Board of Parole.

(d) For the purpose of section 4202 of title 18, United States Code, service by an individual as a member of the United States Board of Parole shall not constitute service as a Commissioner.

Approved March 15, 1976.

*Ante, p. 223.
18 USC 4202
note.*

*5 USC 5332
note.*

*Appropriation
authorization.*

*18 USC 4202
note.*

*Effective date.
18 USC 4201
note.
18 USC 4202
note.*

*18 USC 4202
note.*

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 94-184 (Comm. on the Judiciary) and No. 94-838 (Comm. of Conference).

SENATE REPORTS: No. 94-369 (Comm. on the Judiciary) and No. 94-648 (Comm. of Conference).

CONGRESSIONAL RECORD:

Vol. 121 (1975): May 21, considered and passed House.

Sept. 16, considered and passed Senate, amended.

Vol. 122 (1976): Mar. 2, Senate agreed to conference report.

Mar. 3, House agreed to conference report.

PART 2—PAROLE, RELEASE, SUPERVISION AND RECOMMITMENT OF PRISONERS, YOUTH OFFENDERS, AND JUVENILE DELINQUENTS

Sec.

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- 2.2 Eligibility for parole, regular adult sentences.
- 2.3 Same; adult indeterminate sentences.
- 2.4 Same; juvenile delinquents.
- 2.5 Same; committed youth offenders.
- 2.6 Same; sentences under the Narcotic Addict Rehabilitation Act.
- 2.7 Same; sentences under the gun control statute.
- 2.8 Same; sentences of six months or less followed by probation.
- 2.9 Study prior to sentencing.
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AUTHORITY: 18 U.S.C. 42101-4210, 5001-5037; 28 CFR Part O, Subpart v.

SOURCE: 40 FR 10973, Mar. 10, 1975, unless otherwise noted.

§ 2.1 Definitions.

(a) For the purpose of this part, the term "Board" means the United States Board of Parole; and the terms "Youth Correction Division" and "Division" each mean the Youth Correction Division of the Board.

(b) As used in this part, the term "National Appellate Board" means the Chairman, Vice Chairman, and at least one member of the Board, all of whom also serve as National Appellate Board members in the headquarters office, i.e., Washington, D.C.

(c) All other terms used in this part shall be deemed to have the same meaning as identical or comparable terms have when those terms are used in Chapter 311 of Part IV of Title 18 of the United States Code or Chapter I, Part O, Subpart V of Title 28 of the Code of Federal Regulations.

§ 2.2 Eligibility for parole, regular adult sentences.

Except as set out in the following sections, a federal prisoner wherever confined and serving a definite term or terms of over one hundred and eighty days may, in accordance with the regulations prescribed in this part, be released on parole after serving one-third of such term or terms or after fifteen years of a life sentence or a sentence of over forty-five years (18 U.S.C. 4202).

§ 2.3 Same; adult indeterminate sentences.

A Federal prisoner, other than a juvenile delinquent or a committed youth offender, who has been sentenced to a maximum term of imprisonment in excess of one year may, if the court has designated a minimum term to be served, which term may be less than, but not more than, one-third of the maximum sentence imposed, be released on parole after serving the minimum term. In cases in which a court imposes a maximum sentence of imprisonment upon a prisoner and specifies that the prisoner may become eligible for parole at such times as the Board may determine, the prisoner may be released on parole at any time in the discretion of the Board (18 U.S.C. 4208(a)).

§ 2.4 Same; juvenile delinquents.

The Board of Parole shall release from custody, on such conditions as it deems necessary, each juvenile delinquent who has been committed, as soon as the

Board is satisfied that he is likely to remain at liberty without violating the law and when such release would be in the interest of justice (18 U.S.C. 5041).

§ 2.5 Same; committed youth offenders.

The Youth Correction Division may at any time, after reasonable notice to the Director of the Bureau of Prisons, release conditionally under supervision a committed youth offender. A youth offender committed under section 5010(b) of title 18 of the United States Code to a maximum six year term shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction. A youth offender committed under section 5010(c) of title 18 of the United States Code to a maximum term which is more than six years shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court (18 U.S.C. 5017).

§ 2.6 Same; sentences under the Narcotic Addict Rehabilitation Act.

The Narcotic Addict Rehabilitation Act provides for sentence to a maximum term for treatment as a narcotic addict. Parole may be ordered by the Board after at least six months in treatment, not including any period of time for "study" prior to final judgment of the court. Before parole is ordered by the Board, the Surgeon General or his designated representative must certify that the prisoner has made sufficient progress to warrant his release and the Attorney General or his designated representative must also report to the Board whether the prisoner should be released. Recertification by the Surgeon General prior to re-parole consideration is not required (18 U.S.C. 4254).

§ 2.7 Same; sentences under the gun control statute.

A Federal prisoner sentenced under 18 U.S.C. 924 for violation of Federal gun control laws is considered eligible for parole at such time as the Board may determine. Prisoners sentenced under this provision are considered for parole in the same manner as if they had been sentenced under 18 U.S.C. 4208(a)(2).

§ 2.8 Same; sentences of six months or less followed by probation.

A Federal prisoner sentenced under 18 U.S.C. 3651 to serve a period of six

months or less in a jail type or treatment institution, with a period of probation to follow, is not eligible for parole.

§ 2.9 Study prior to sentencing.

(a) When an adult Federal offender has been committed to an institution by the sentencing court for observation and study prior to sentencing under the provisions of 18 U.S.C. 4208(b), the report to the sentencing court is prepared and submitted directly by the United States Bureau of Prisons.

(b) The court may order a youth to be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Youth Correction Division shall report its findings to the court (18 U.S.C. 5010(e)).

§ 2.10 Date service of sentence commences.

(a) Service of a sentence of imprisonment commences to run on the date on which the person is received at the penitentiary, reformatory, or jail for service of the sentence: *Provided, however,* That any such person shall be allowed credit toward the service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed.

(b) Service of the sentence of any person who is committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served shall commence to run from the date on which he is received at such jail or other place of detention.

(c) Service of the sentence of a committed youth offender or a person committed under the Narcotic Addict Rehabilitation Act commences to run and continues to run uninterruptedly from the date of conviction, except when such offender is on bail pending appeal or is in escape status.

§ 2.11 Application for parole.

(a) A prisoner, other than a juvenile delinquent, a committed youth offender, or an offender committed under the Narcotic Addict Rehabilitation Act, desiring to apply for parole shall execute such application forms as may be pre-

scribed by the Board. Such forms shall be available at each Federal institution and shall be provided to prisoners eligible for parole. Such prisoners may waive parole consideration on a form provided for that purpose. If such a prisoner waives parole consideration, he may later apply for parole and may be heard during the next visit of the Board to the institution where he is confined, provided he has applied prior to 45 days from the first scheduled date of this visit. A prisoner who receives an initial hearing may not waive any subsequent review hearing scheduled by the Board except as provided in § 2.16(c). New parole applications are not necessary for such review hearings.

(b) A prisoner who is required to apply before receiving a parole hearing but who fails to submit either an application or a waiver form shall be referred to the Board's representatives by the chief executive officer of the institution. The prisoner shall then receive an explanation of his right to apply for parole at a later date.

(c) Prisoners committed under the Federal Juvenile Delinquency Act, the Youth Correction Act, and the Narcotic Addict Rehabilitation Act shall be considered for parole without application and may not waive parole consideration.

§ 2.12 Hearing procedure.

(a) Prisoners shall be given written notice of the time and place of the hearing described in §§ 2.13 and 2.14. Prisoners may be represented at hearings by a person of their choice. The function of the prisoner's representative shall be to offer a statement at the conclusion of the interview of the prisoner by the examiner panel, and to provide such additional information as the examiner panel shall request. Interested parties who oppose parole may select a representative to appear and offer a statement. The presiding hearing examiner shall limit or exclude any irrelevant or repetitious statement.

(b) No interviews with the Board, or any representative thereof, shall be granted to a prisoner unless his name is docketed for a hearing in accordance with Board procedures. Hearings shall not be open to the public, and the records of all such hearings shall be treated as confidential and shall not be open to inspection by the prisoner concerned, his representative or any other unauthorized person.

§ 2.13 Initial hearing.

(a) An initial hearing shall be conducted by a panel of two hearing examiners designated by the Board. The examiner panel shall inform the prisoner of the decision and, if parole is denied, of the reasons therefor. The decision of the examiner panel, subject to provisions of § 2.23 (b) and (c) shall be final unless action is initiated by the Regional Director pursuant to § 2.24.

(b) In accordance with § 2.18 the reasons for parole denial may include, but are not limited to, the following reasons, with further specification where appropriate:

(1) Release at this time would depreciate the seriousness of the offense committed and would thus be incompatible with the welfare of society.

(2) There does not appear to be a reasonable probability at this time that the prisoner would live and remain at liberty without violating the law.

(3) The prisoner has (a serious) (repeated) disciplinary infraction(s) in the institution.

(4) Additional institutional treatment is required to enhance the prisoner's capacity to lead a law-abiding life.

(c) In lieu of or in combination with the reasons in paragraph (b) (1) and (2) of this section the prisoner after initial hearings shall be furnished a guideline evaluation statement which includes the prisoner's salient factor score and offense severity rating as described in § 2.20, as well as the reasons for a decision to continue the prisoner for a period outside the range indicated by the guidelines.

(d) Written notification of the decision or referral under § 2.17 or § 2.24 shall be mailed or transmitted to the prisoner within fifteen working days of the date of the hearing. If parole is denied, the prisoner shall also receive in writing as a part of the decision, the reasons therefor.

§ 2.14 Review hearings.

All hearings subsequent to the initial hearing shall be considered as review hearings. Review hearings by examiners designated by the Board shall be scheduled for each Federal institution, and prisoners shall appear for such hearings in person, except for the following cases:

(a) During the month preceding a regularly scheduled review hearing, a case may be reviewed on the record by an examiner panel (including a current

institutional progress report). If the decision is to grant parole, no hearing shall be conducted.

(b) A prisoner sentenced under the Youth Corrections Act or Federal Juvenile Delinquency Act or a prisoner sentenced to a maximum term of more than 18 months under 18 U.S.C. 4208(a)(2) or 924 who receives a continuance to a date past one-third of his maximum sentence at an initial hearing shall upon completion of one-third of his sentence receive a review by an examiner panel on the record (including a current institutional progress report).

(c) Notification of review decisions shall be given as set forth in § 2.13(d). No prisoner shall be continued for more than three years from the time of last hearing without further review.

§ 2.15 Petition for consideration of parole prior to date set at hearing.

When a prisoner has met the minimum time of imprisonment required by law, the Bureau of Prisons may petition the responsible Regional Director for reopening the case under § 2.28 and consideration of parole prior to the date set by the Board at the initial or review hearing. The petition must show cause why it should be granted, i.e., an emergency, hardship, or the existence of other extraordinary circumstances that would warrant consideration of early parole.

§ 2.16 Parole of prisoner in state or territorial institution.

(a) Any person who has been convicted of any offense against the United States which is punishable by imprisonment but who is confined therefor in a state reformatory or other state or territorial institution, shall be eligible for parole by the Board on the same terms and conditions by the same authority, and subject to recommitment for the violation of such parole, as though he were confined in a Federal penitentiary, reformatory, or other correctional institution.

(b) Federal prisoners serving concurrent state and Federal sentences in state, local, or territorial institutions shall be furnished upon request parole application forms. Upon receipt of the application and any supplementary classification material submitted by the institution, the parole decision shall be made by an examiner panel of the appropriate region on the record only.

(c) Prisoners who are serving federal sentences exclusively but who are being boarded in state, local or territorial institutions may be considered for parole on the record only, provided they sign a waiver of their right to a personal hearing. If such a prisoner does not waive a personal hearing, he may be transferred by the Bureau of Prisons to a Federal institution where he will be considered for parole at the next visit by an examiner panel of the Board.

§ 2.17 Original jurisdiction cases.

(a) A Regional Director may designate certain cases as original jurisdiction cases. The Regional Director shall then forward the case with his vote, and any additional comments he may deem germane, to the National Directors for decision. Decisions shall be based upon the concurrence of three votes with the appropriate Regional Director and each National Director having one vote. Additional votes, if required, shall be cast by the other Regional Directors on a rotating basis as established by the Chairman of the Board.

(b) The following criteria will be used in designating cases as original jurisdiction cases:

(1) Prisoners who have committed serious crimes against the security of the Nation, e.g., espionage, or aggravated subversive activity.

(2) Prisoners whose offense behavior (A) involved an unusual degree of sophistication or planning or (B) was part of a large scale criminal conspiracy or a continuing criminal enterprise.

(3) Prisoners who have received national or unusual attention because of the nature of the crime, arrest, trial, or prisoner status, or because of the community status of the offender or his victim.

(4) Long-term sentences. Prisoners sentenced to a maximum term of forty-five years (or more) or prisoners serving life sentences.

§ 2.18 Granting of parole.

The granting of parole rests in the discretion of the Board of Parole. The Board may parole a prisoner who is otherwise eligible if (a) in the opinion of the Board such release is not incompatible with the welfare of society; (b) he has observed substantially the rules of the institution in which he is confined; and (c) there is a reasonable probability

that he will live and remain at liberty without violating the laws (18 U.S.C. 4203(a)).

§ 2.19 Consideration by the Board.

In the exercise of its discretion, the Board generally considers some or all of the following factors and such others as it may deem appropriate:

- (a) Sentence data:
 - (1) Type of sentence;
 - (2) Length of sentence;
 - (3) Recommendations of judge, U.S. Attorney, and other responsible officials.
- (b) Present offense:
 - (1) Facts and circumstances of the offense;
 - (2) Mitigating and aggravating factors;
 - (3) Activities following arrest and prior to confinement, including adjustment on bond or probation, if any.
- (c) Prior criminal record:
 - (1) Nature and pattern of offenses;
 - (2) Adjustment to previous probation, parole, and confinement;
 - (3) Detainers.
- (d) Changes in motivation and behavior:
 - (1) Changes in attitude toward self and others;
 - (2) Reasons underlying changes;
 - (3) Personal goals and description of personal strength or resources available to maintain motivation for law abiding behavior.
- (e) Personal and social history:
 - (1) Family and marital history;
 - (2) Intelligence and education;
 - (3) Employment and military experience;
 - (4) Physical and emotional health.
- (f) Institutional experience:
 - (1) Program goals and accomplishments:
 - (i) Academic;
 - (ii) Vocational education, training or work assignments;
 - (iii) Therapy.
 - (2) General adjustment:
 - (i) Inter-personal relationships with staff and inmates;
 - (ii) Behavior, including misconduct.
- (g) Community resources, including lease plans:
 - (1) Residence; live alone, with family or others;
 - (2) Employment, training, or academic education;

- (3) Special needs and resources to meet them.

- (h) Results of scientific data and tools:
 - (1) Psychological tests and evaluations;

- (2) Statistical parole experience tables (salient factor score).

- (i) Paroling policy guidelines as set forth in § 2.20;

- (j) Comments by hearing examiners, evaluative comments supporting a decision, including impressions gained from the hearing.

§ 2.20 Paroling policy guidelines; statement of general policy.

(a) To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration, the United States Board of Parole has adopted guidelines for parole release consideration.

(b) These guideline indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics. The time ranges specified by the guidelines are established specifically for the cases with good institutional adjustment and program progress.

(c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered. For example, cases with exceptionally good institutional program achievement may be considered for earlier release.

(d) The guidelines contain examples of offense behaviors for each severity level. However, especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed.

(e) An evaluation sheet containing a "salient factor score" serves as an aid in determining the parole prognosis (potential risk of parole violation). However, where circumstances warrant, clinical evaluation of risk may override this predictive aid.

(f) These guidelines do not apply to parole revocation or re-parole considerations. The Board shall review the guidelines periodically and may revise or modify them at any time as deemed appropriate.

ADULT

[Guidelines for decisionmaking, average total time served before release (including jail time)]

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (adjudicative factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
LOW				
Immigration law violations.....				
Minor theft (includes larceny and simple possession of stolen property less than \$1,000). Walkaway.....	6 to 10 mo.....	8 to 12 mo.....	10 to 14 mo.....	12 to 16 mo.
LOW MODERATE				
Alcohol law violations.....				
Counterfeit currency (passing/possession less than \$1,000). Drugs: marijuana, simple possession (less than \$500). Firearms Act., possession/purchase/sale (single weapon—not altered or mischitinous). Forgery/fraud (less than \$1,000). Income tax evasion (less than \$10,000). Selective Service Act violations.....	8 to 12 mo.....	12 to 16 mo.....	16 to 20 mo.....	20 to 25 mo.
Theft from mail (less than \$1,000)				
MODERATE				
Bribery of public officials.....				
Counterfeit currency (passing/possession \$1,000 to \$19,999). Drugs: “Hard drugs”, possession by drug user (less than \$500). Marijuana, possession with intent to distribute/sale (less than \$5,000). “Soft drugs”, possession with intent to distribute/sale (less than \$5,000). Embezzlement (less than \$20,000). Explosives, possession/transportation. Firearms Act., possession/purchase/sale (altered weapon(s), machinegun(s), or multiple weapons). Income tax evasion (\$10,000 to \$50,000). Interstate transportation of stolen/forged securities (less than \$20,000). Mailing threatening communications.....	12 to 16 mo.....	16 to 18 mo.....	18 to 24 mo.....	24 to 30 mo.
Misprediction of felony.....				
Receiving stolen property with intent to resell (less than \$20,000). Smuggling of aliens.....				
Theft/forgery/fraud (\$1,000 to \$19,999). Theft of motor vehicle (not multiple theft or for resale).				

Chapter I—Department of Justice

§ 2.20

ADULT

[Guidelines for decisionmaking, average total time served before release (including jail time)]

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
HIGH				
Burglary or larceny (other than embezzlement) from bank or post office.				
Counterfeit currency (passing/possession \$20,000 or more).				
Counterfeiting (manufacturing).				
Drugs:				
"Hard drugs" (possession with intent to dis- tribute/sale) by drug user to support own habit only.				
Marijuana, possession with intent to distrib- ute/sale (\$5,000 or more).				
"Soft drugs", possession with intent to distrib- ute/sale (\$500 to \$5,000).				
Embezzlement (\$20,000 to \$100,000).				
Interstate transportation of stolen, forged securities (\$20,000 to \$100,000).				
Mann Act (no force—commercial purposes).				
Organized vehicle theft.				
Receiving stolen property (\$20,000 to \$100,000).				
Ticket/forgery/fraud (\$20,000 to \$100,000).				
VERY HIGH				
Robbery (weapon or threat).				
Drugs:				
"Hard drugs" (possession with intent to dis- tribute/sale) for profit [no prior conviction for sale of "hard drugs"].				
"Soft drugs", possession with intent to distrib- ute/sale (over \$5,000).				
Extortion.				
Mann Act (force).				
Sexual act (force).				
GREATEST				
Aggravated felony (e.g. robbery, sexual act, aggra- vated assault)—weapon fired or personal injury.				
Aircraft hijacking.				
Drugs: "Hard drugs" (possession with intent to distribute/sale) for profit [prior conviction(s) for sale of "hard drugs"].				
Personage.				
Explosives (detonation).				
Kidnapping.				
Capital homicide.				
(Greater than above—however, specific ranges are not given due to the limited number of cases and the extreme variations in severity possible within the category.)				

NOTES

1. These guidelines are predicated upon good institutional conduct and program performance.
2. If an offense behavior is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed.
3. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
4. If an offense behavior involved multiple separate offenses, the severity level may be increased.
5. If a continuance is to be given, allow 30 d (1 mo) for release program provision.
6. "Hard drugs" include heroin, cocaine, morphine, or opiate derivatives, and synthetic opiate substitutes.

Title 28—Judicial Administration

YOUTH

Guidelines for decisionmaking, average total time served before release (including jail time)]

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor score)			
	Very good (11 to 5)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
LOW				
Immigration law violations.....				
Minor theft (includes larceny and simple possession of stolen property less than \$1,000). Walkaway.....	6 to 10 mo.	8 to 12 mo.	10 to 14 mo.	12 to 16 mo.
LOW MODERATE				
Alcohol law violations.....				
Counterfeit currency (passing/possession less than \$1,000). Drugs: marijuana, simple possession (less than \$500). Firearms Act, possession/purchase/sale (single weapon—not altered or machinegun). Forgery/fraud (less than \$1,000). Income tax evasion (less than \$10,000). Selective Service Act violations.....	6 to 12 mo.	12 to 16 mo.	16 to 20 mo.	20 to 25 mo.
Theft from mail (less than \$1,000). MODERATE				
Bribery of public officials.....				
Counterfeit currency (passing/possession \$1,000 to \$19,999). Drugs: "Hard drugs", possession by drug user (less than \$500). Marijuana, possession with intent to distribute/sale (less than \$5,000). "Soft drugs", possession with intent to distribute/sale (less than to \$500). Embezzlement (less than \$20,000). Explosives, possession/transportation.....	8 to 13 mo.	13 to 17 mo.	17 to 21 mo.	21 to 26 mo.
Firearms Act, possession/purchase/sale (altered weapon(s), machinegun(s), or multiple weapons). Income tax evasion (\$10,000 to \$50,000). Interstate transportation of stolen/forged securities (less than \$20,000). Mailing threatening communications.....				
Mispayment of felony.....				
Receiving stolen property with intent to resell (less than \$20,000). Smuggling of aliens.....				
Theft/forgery/fraud (\$1,000 to \$19,999). Theft of motor vehicle (not multiple theft or for resale). 70				

Chapter I—Department of Justice

§ 2.20

YOUTH

[Guidelines for decisionmaking, average total time served before release (including jail time)]

Offender characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
HIGH				
Robbery or larceny (other than embezzlement) from bank or post office.				
Counterfeit currency (passing/possession \$20,000 or more).				
Counterfeiting (manufacturing).				
"Hard drugs" (possession with intent to dis- tribute/sale) by drug user to support own habit only.				
Marijuana, possession with intent to distrib- ute/sale (\$5,000 or more).				
"Soft drugs", possession with intent to distrib- ute/sale (\$500 to \$5,000).				
Embezzlement (\$20,000 to \$100,000).				
Private transportation of stolen/forged securities (\$1,000 to \$100,000).				
Vaughn Act (no force—commercial purposes).				
Armed vehicle theft.				
Larceny stolen property (\$20,000 to \$100,000).				
False forgery/fraud (\$20,000 to \$100,000).				
VERY HIGH				
Robbery (weapon or threat).				
Drugs				
"Hard drugs" (possession with intent to dis- tribute/sale) for profit (no prior conviction for sale of "hard drugs").				
"Soft drugs", possession with intent to distrib- ute/sale (over \$5,000).				
Extortion.				
Vaughn Act (force).				
Sexual act (force).				
GREATEST				
Aggravated robbery (e.g. robbery, sexual act, aggra- vated assault)—weapon fired or personal injury.				
Aircraft hijacking.				
More "Hard drugs" (possession with intent to distribute/sale) for profit (prior conviction(s) for sale of "hard drugs").				
Explosives.				
Explosives (detonation).				
Arson.				
Child homicide.				
(Greater than above—however, specific ranges are not given due to the limited number of cases and the extreme variations in severity possible within the category.)				

NOTES

1. These guidelines are predicated upon good institutional conduct and program performance.
2. If an offense behavior is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed.
3. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
4. If an offense behavior involved multiple separate offenses, the severity level may be increased.
5. If a continuance is to be given, allow 80 d (1 mo) for release program provision.
6. "Hard drugs" include heroin, cocaine, morphine, or opiate derivatives, and synthetic opiate substitutes.

NARA

[Guidelines for decisionmaking, average total time served before release (including jail time)]

Offense characteristics: Severity of offense behavior (examples)	Offender characteristics: Parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
LOW				
Immigration law violations.....				
Minor theft (includes larceny and simple possession of stolen property less than \$1,000). Walkaway.....	6 to 12 mos.		12 to 18 mos.	
LOW MODERATE				
Alcohol law violations.....				
Counterfeit currency (passing/possession less than \$1,000). Drugs: Marijuana, simple possession (less than \$500). Firearms Act, possession/purchase/sale (single weapon—not altered or machinegun). Forgery/fraud (less than \$1,000). Income tax evasion (less than \$10,000). Selective Service Act violations.....	6 to 12 mos.		12 to 18 mos.	
Theft from mail (less than \$1,000).				
MODERATE				
Bribery of public officials.....				
Counterfeit currency (passing/possession \$1,000 to \$19,999). Drugs: "Hard drugs", possession by drug user (less than \$500). Marijuana, possession with intent to distrib- ute/sale (less than \$5,000). "Soft drugs", possession with intent to distrib- ute/sale (less than \$500). Embezzlement (less than \$20,000). Explosives, possession/transportation. Firearms Act, possession/purchase/sale (altered weapon(s), machinegun(s), or multiple weapons). Income tax evasion (\$10,000 to \$50,000). Interstate transportation of stolen/forged securities (less than \$20,000). Mailing threatening communications.....	12 to 18 mos.		18 to 24 mos.	
Misp ection of felony.....				
Receiving stolen property with intent to resell (less than \$20,000). Smuggler of aliens.....				
Theft/forgery/fraud (\$1,000 to \$19,999). Theft of motor vehicle (not multiple theft or for resale).				

Chapter I—Department of Justice

\$ 2.20

NARA

[Guidelines for decisionmaking, average total time served before release (including jail time)]

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: probable prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
HIGH				
Burglary or larceny (other than embezzlement) from bank or post office.				
Counterfeit currency (passing/possession \$20,000 or more).				
Counterfeiting (manufacturing).				
Drugs:				
"Hard drugs" (possession with intent to dis- tribute/sale) by drug user to support own habit only.				
Marijuana, possession with intent to distrib- ute/sale (\$5,000 or more).				
"Soft drugs", possession with intent to distrib- ute/sale (\$500 to \$5,000).				
Embezzlement (\$20,000 to \$100,000).				
Interstate transportation of stolen/forged securities (\$20,000 to \$100,000).				
Mann Act (no force—commercial purposes).				
Organized vehicle theft.				
Receiving stolen property (\$20,000 to \$100,000).				
Theft/forgery/fraud (\$20,000 to \$100,000).				
VERY HIGH				
Robbery (weapon or threat).				
Drugs:				
"Hard drugs" (possession with intent to dis- tribute/sale) for profit (no prior conviction for sale of "hard drugs").				
"Soft drugs", possession with intent to distrib- ute/sale (over \$5,000).				
Extortion.				
Mann Act (force).				
Sexual act (force).				
GREATEST				
Aggravated felony (e.g. robbery, sexual act, aggra- vated assault)—weapon fired or personal injury.				
Aircraft hijacking.				
Drugs:				
"Hard drugs" (possession with intent to dis- tribute/sale) for profit (prior conviction(s) for sale of "hard drugs").				
Espionage.				
Explosives (detonation).				
Kidnapping.				
Willful homicide.				
(Greater than above—however, specific ranges are not given due to the limited number of cases and the extreme variations in severity possible within the category.)				

NOTES

1. These guidelines are predicated upon good institutional conduct and program performance.
2. If an offense behavior is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed.
3. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
4. If an offense behavior involved multiple separate offenses, the severity level may be increased.
5. If a continuance is to be given, allow 30 d (1 mo.) for release program provision.
6. "Hard drugs" include heroin, cocaine, morphine, or opiate derivatives, and synthetic opiate substitutes.

§ 2.21

Title 28—Judicial Administration

SALIENT FACTOR SCORE

Case name.....	Register No.....	<input type="checkbox"/>	
Item A			
No prior convictions (adult or juvenile) = 2			
One or two prior convictions = 1			
Three or more prior convictions = 0			
Item B			
No prior incarcerations (adult or juvenile) = 2			
One or two prior incarcerations = 1			
Three or more prior incarcerations = 0			
Item C			
Age at first commitment (adult or juvenile) 18 years or older = 1			
Otherwise = 0			
Item D			
Commitment offense did not involve auto theft = 1			
Otherwise = 0			
Item E			
Never had parole revoked or been committed for a new offense while on parole = 1			
Otherwise = 0			
Item F			
No history of heroin, cocaine, or barbiturate dependence = 1			
Otherwise = 0			
Item G			
Has completed 12th grade or received GED = 1			
Otherwise = 0			
Item H			
Verified employment (or full-time school attendance) for a total of at least 6 months during the last 2 years in the community = 1			
Otherwise = 0			
Item I			
Release plan to live with spouse and/or children = 1			
Otherwise = 0			
Total score.....			<input type="checkbox"/>

§ 2.21 Reports considered.

Decisions as to whether a parole shall be granted or denied shall be determined on the basis of the application, if any, submitted by the prisoner, together with the classification study and all reports assembled by all the services which shall have been active in the development of the case. These reports may include the reports by the prosecution officers, reports by or for the sentencing court, records from the Federal Bureau of Investigation, reports from the officials in each institution in which the applicant shall have been confined, all records of social agency contacts, and all correspondence and such other records as are necessary or appropriate for complete presentation of the case. Before making a decision as to whether a parole should be granted or denied in any particular case, the Board will consider all available relevant and pertinent information concerning the case. The Board encourages the submission of such information by interested persons.

§ 2.22 Communication with the Board.

Attorneys, relatives, or interested parties wishing a personal interview to discuss a specific case with a representative of the Board of Parole must submit a written request to the appropriate regional office setting for the nature of the information to be discussed. Such personal interview may be conducted by staff personnel in the regional offices. Personal interviews, however, shall not be held by an examiner or member of the Board, except under the Board's appeals procedures.

§ 2.23 Delegation to hearing examiners.

(a) There is hereby delegated to hearing examiners the authority to make decisions relative to the granting or denial of parole, or reparation and revocation or reinstatement of parole or mandatory release and to fix conditions of parole.

(b) Hearing examiners shall function as two-man panels and the concurrence of both examiners shall be required for their decision. In the event of a split decision by the panel, the appropriate

regional Administrative Hearing Examiner shall cast the deciding vote.

(c) When a hearing examiner panel proposes to make a decision which falls outside of explicit guidelines for parole decision-making promulgated by the Board, the case shall be reviewed by the appropriate regional Administrative Hearing Examiner. When an Administrative Hearing Examiner does not concur in a decision of an examiner panel to set a parole effective date or continuance outside the Board's guidelines he may with the concurrence of the Regional Director modify the date to the nearest limit of the guidelines.

(d) In the event the Administrative Hearing Examiner is serving as a member of a hearing examiner panel or is otherwise unavailable, cases requiring his action under paragraphs (b) and (c) of this section will be referred to another hearing examiner.

§ 2.24 Review of panel decision by the Regional Director and the National Directors.

A Regional Director may review the decision of any examiner panel and refer this decision, prior to written notification to the prisoner, with his recommendation and vote to the National Directors for reconsideration and any action deemed appropriate. Written notice of this reconsideration action shall be mailed or transmitted to the prisoner within fifteen working days of the date of the hearing. The Regional Director and each National Director shall have one vote and decisions shall be based upon the concurrence of two votes.

§ 2.25 Appeal of hearing panel decision.

(a) A prisoner may file with the responsible Regional Director a written appeal of a decision of a hearing examiner panel or a decision under § 2.24 to grant, deny or revoke parole or to revoke mandatory release. This appeal must be filed on a form provided for that purpose within thirty days from the date of entry of such decision. The appeal shall be considered by the Regional Director who may affirm the decision, order a new institutional hearing, order a regional appellate hearing, reverse the decision, or modify a continuance or the effective date of parole. Reversal of a decision or the modification of such a decision by more than one hundred eighty days, whether based upon the record or following a regional appellate hearing, shall re-

quire the concurrence of two out of three Regional Directors. Appellate decisions requiring a second or additional vote shall be referred to other Regional Directors on a rotating basis as established by the Chairman.

(b) Regional appellate hearings shall be held at the regional office before the Regional Director. Attorneys, relatives and other interested parties who wish to appear must submit a written request to the Regional Director stating their relationship to the prisoner and the general nature of the information they wish to present. The Regional Director shall determine if the requested appearances will be permitted. The prisoner shall not appear personally.

(c) If no appeal is filed within thirty days of entry of the original decision, this decision shall stand as the final decision of the Board.

(d) Appeals under this section may be based only upon the following grounds:

(1) The reasons given for a denial or continuance do not support the decision; or

(2) There was significant information in existence but not known at the time of the hearing.

§ 2.26 Appeal to National Appellate Board.

(a) A prisoner may file a written appeal of the Regional Director's decision under § 2.25 to the National Appellate Board on a form provided for that purpose within thirty days after the entry of the Regional Director's written decision. The National Appellate Board may, upon the concurrence of two members, affirm, modify, or reverse the decision, or order a rehearing at the institutional or regional level.

(b) The bases for such appeal shall be the same as for a regional appeal as set forth in § 2.25(d). However, any matter not raised on a regional level appeal may not be raised on appeal to the National Appellate Board.

(c) Decisions of the National Appellate Board shall be final.

§ 2.27 Appeal of original jurisdiction cases.

(a) Cases decided under the procedure specified in § 2.17 may be appealed within thirty days of the entry of the decision on a form provided for this purpose. Attorneys, relatives, and other interested parties who wish to submit written information in support of a prisoner's appeal

§ 2.28

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should send such information to the National Appellate Board Executive, United States Board of Parole, 320 First Street NW., Washington, D.C. 20537. Appeals of original jurisdiction cases shall be reviewed by the entire Board at its next quarterly meeting. A quorum of five members shall be required and all decisions shall be by majority vote. The Chairman shall vote on the decision only in the absence of a member. This appellate decision shall be final.

(b) Attorneys, relatives, or other interested parties who wish to speak for or against parole at such consideration must submit a written request to the Chairman of the Board stating their relationship to the prisoner and the general nature of the material they wish to present. The Chairman shall determine if the requested appearances will be permitted.

(c) If no appeal is filed within thirty days of the entry of the decision under § 2.17, this decision shall stand as the final decision of the Board.

(d) The bases for this appeal shall be the same as for a regional appeal as set forth in § 2.25(d).

§ 2.28 Reopening of cases.

Notwithstanding the appeal procedure of § 2.25 and § 2.26, the appropriate Regional Director may on his own motion reopen a case at any time upon the receipt of new information of substantial significance and may then take any action authorized under the provisions and procedures of § 2.25. Original jurisdiction cases may be reopened upon the motion of the appropriate Regional Director under the procedures of § 2.17.

§ 2.29 Withheld and forfeited good time.

(a) Section 4202 of title 18 of the United States Code permits Federal prisoners to be paroled if they have observed the rules of the institution in which they are confined and if they are otherwise eligible for parole. Any forfeiture of statutory good time shall be deemed to indicate that the prisoner has violated the rules of the institution to a serious degree, and a parole will not be granted in any such case in which such a forfeiture remains effective against the prisoner concerned. Any withholding of statutory good time shall be deemed to indicate that the prisoner has engaged in some less serious breach of the rules of the institution. Nevertheless, parole will not usually be granted unless and until such good time has been restored.

(b) Neither a forfeiture of good time nor a withholding of good time shall bar a prisoner from applying for and receiving a parole hearing.

(c) The above restrictions shall not apply, however, to the forfeiture or withholding of *extra good time* which is granted because of meritorious behavior. Parole may be ordered without regard to a prisoner's status insofar as *extra good time* is concerned, although the reasons for any forfeiture or withholding will be included among the other factors used in making the parole decision.

§ 2.30 Release on parole.

(a) A grant of parole shall not be deemed to be effective until a certificate of parole has been delivered to the prisoner.

(b) Parole release dates generally will not be set more than six months from the date of the parole hearing. Exceptions may be made in extraordinary situations or when necessary to permit an adequate period of residence in a Community Treatment Center. Such residence in a Community Treatment Center shall not generally exceed one hundred and twenty days. An effective date of parole shall not be set for a Saturday, Sunday, or a legal holiday.

(c) When an effective date of parole has been set by the Board, release on that date shall be conditioned upon continued good conduct by the prisoner and the completion of a satisfactory plan for parole supervision. The appropriate Regional Director may, on his own motion, reconsider any case prior to release and may reopen and advance or retard a parole date. A parole grant may be retarded for up to one hundred and twenty days without a hearing for development and approval of release plans.

§ 2.31 False or withheld information.

All paroles are ordered on the assumption that information from the prisoner has not been fraudulently given or withheld from the Board. If evidence comes to the attention of the Board that a prisoner willfully concealed, or misrepresented information deemed significant, the Regional Director may schedule a hearing to determine whether parole should be revoked or rescinded. Such a hearing shall be conducted in accordance with the procedure set out in § 2.37 (b)(2).

§ 2.32 Committed fines.

In any case in which a prisoner shall have had a fine imposed upon him by the committing court for which he is to stand committed until it is paid or until he is otherwise discharged according to law, such prisoner shall not be released on parole or mandatory release until payment of the fine, or until the fine commitment order is discharged according to law as follows:

(a) An indigent prisoner may make application to a U.S. Magistrate in the District wherein he is incarcerated or to the chief executive officer of the institution setting forth, under institutional regulations, his inability to pay such fine; if the magistrate or chief executive officer shall find that the prisoner, having no assets exceeding \$20 in value except such as are by law exempt from being taken on execution for debt, is unable to pay the fine, and if the prisoner takes a prescribed oath of indigency, he shall be discharged from the commitment obligation of the committed fine sentence.

(b) If the prisoner is found to possess assets in excess of the exemption in paragraph (a) of this section nevertheless if the Board shall find that retention of all of such assets is reasonably necessary for his support or that of his family, upon taking of the prescribed oath concerning his assets the prisoner shall be discharged from the commitment obligation of the committed fine sentence. If the Board shall find that retention by the prisoner of any part of his assets is reasonably necessary for his support or that of his family, the prisoner upon taking of the prescribed oath concerning his assets, shall be discharged from the commitment obligation of the committed fine sentence upon payment on account on his fine of that portion of his assets in excess of the amount found to be reasonably necessary for his support or that of his family.

(c) Discharge from the commitment obligation of any committed fine sentence does not discharge the prisoner's obligation to pay the fine as a debt due the United States.

§ 2.33 Parole to detainees; statement of policy.

The policy of the Board with regard to parole to detainees is in general accord with the principles recommended by the Association of Administrators of

the Interstate Compact for the Supervision of Parolees and Probationers:

(a) The status of detainees held against prisoners in Federal institutions will be investigated, so far as is reasonably possible, prior to parole hearings.

(b) In appropriate cases summary information regarding such prisoner will be provided to state or local authorities. The Board urges institution officials to provide such information.

(c) Where the detainer is not lifted, the Board may grant parole to such detainee if a prisoner is considered in other respects to be a good parole risk. Ordinarily, however, the Board will grant parole to such detainee only if the status of that detainee has been investigated.

(d) The Board will cooperate in working out arrangements for concurrent supervision with other jurisdictions where it is feasible and where release on parole appears to be justified.

(e) The presence of a detainee is not of itself a valid reason for the denial of parole. It is recognized that where the prisoner appears to be a good parole risk, there may be distinct advantage in granting parole despite a detainee.

§ 2.34 Parole to local or immigration detainees.

(a) When a state or local detainer is outstanding against a prisoner whom the Board wishes to parole, the Board may order either of the following:

(1) "Parole to the actual physical custody of the detaining authorities only." In this event, release is not to be effected except to the detainer. When such a detainer is withdrawn, the prisoner is not to be released unless and until the Board makes a new order of parole.

(2) "Parole to the actual physical custody of the detaining authorities or an approved plan." In this event, release is to be effected even though the detainer might be withdrawn, providing there is an acceptable plan for community supervision.

(b) When the Board wishes to parole a prisoner subject to a detainer filed by Federal immigration officials, the Board may order one of the following:

(1) "Parole for deportation only." In this event, release is not to be effected unless immigration officials make full arrangements for deportation immediately upon release.

(2) "Parole to the actual physical custody of the immigration authorities

only." In this event, release is not to be effected unless immigration officials take the prisoner into custody—regardless of whether or not deportation follows.

(3) "Parole to the actual physical custody of the immigration authorities or an approved plan." In this event, release is to be effected regardless of whether or not immigration officials take the prisoner into custody, providing there is an acceptable plan for community supervision.

(c) As used in this section "parole to a detainer" means release to the "physical custody" of the authorities who have lodged the detainer. Temporary detention in a jail in the county where the institution of confinement is located does not constitute release on parole. If the authorities who lodged the detainer do not take the prisoner into custody for any reason, he shall be returned to the institution to await further order from the Board.

§ 2.35 Mental competency proceedings.

(a) Whenever a prisoner or paroled is scheduled for a hearing in accordance with the provisions of this part and reasonable doubt exists as to his mental competency, i.e., his ability to understand the nature of and participate in scheduled proceedings, a preliminary hearing to determine his mental competency shall be conducted by a panel of hearing examiners or other official(s) (including a U.S. Probation Officer) designated by the Board of Parole.

(b) At the competency hearing, the hearing examiners or designated official(s) shall receive oral or written psychiatric testimony and other evidence that may be available. A preliminary determination of the prisoner's mental competency shall be made upon the testimony, evidence, and personal observations of the prisoner. If the examiner panel or designated official(s) determines that the prisoner is mentally competent, the previously scheduled hearing shall be held. If they determine that the prisoner is not mentally competent, the previously scheduled hearing shall be temporarily postponed.

(c) Whenever the hearing examiners or designated official(s) determine that a person is incompetent and postpone the previously scheduled hearing, they shall forward the record of the preliminary hearing with their findings to the Regional Director for review. If the Regional Director concurs with their

findings, he shall order the temporarily postponed hearing to be postponed indefinitely until such time as it is determined that the prisoner or paroled has recovered sufficiently to understand the nature of and participate in the proceedings and, in the case of a paroled, may order such paroled committed to a Bureau of Prison's facility for further examination. In any such case, the Regional Director shall require a progress report at least every six months on the mental health of the prisoner. When the Regional Director determines that the prisoner has recovered sufficiently, he shall reschedule the hearing for the earliest possible date.

(d) If the Regional Director disagrees with the findings of the hearing examiners or designated official(s) as to the mental competency of the prisoner, he shall take such action as he deems appropriate.

§ 2.36 Release plans.

(a) A grant of parole is conditioned upon the approval of release plans by the Regional Director. In general, the following factors should be present before a prisoner is released after parole has been granted:

(1) The probation officer to whom the releasee is assigned may, in his discretion, require that there be available to the releasee an adviser who is a responsible, reputable, and law-abiding citizen living in or near the community in which the releasee will reside. The adviser should act as a source of advice for the releasee relative to community adjustment. The adviser may provide special services such as vocational placement, personal counsel, or referral to community agencies. The adviser is expected to report to the probation officer any law violation or serious misconduct on the part of the releasee. The adviser may be required by the probation officer to countersign the paroled's monthly supervision report to indicate actual contact with the paroled.

(2) There should be satisfactory evidence that the prospective paroled will be legitimately employed following his release; and

(3) There should be satisfactory assurance that necessary aftercare will be available to a paroled who is ill or who has some other problem which requires special care.

(b) Generally, paroleds will be released only to the place of their legal residence

unless the Board is satisfied that another place of residence will serve the public interest more effectively or will improve the probabilities of the applicant's readjustment.

§ 2.37 Rescission of parole.

(a) When an effective date of parole has been set by the Board, release on that date shall be conditioned upon continued good conduct by the prisoner. If a prisoner has been granted parole and has subsequently been charged with institutional misconduct sufficient to become a matter of record, the Regional Director shall be advised promptly of such misconduct. The prisoner shall not be released until the institution has been notified that no change has been made in the Board's order to parole.

(1) Upon receipt of information that a prisoner has violated the rules of the institution, the Regional Director may retard the parole grant for up to sixty days without a hearing or may retard the parole grant and schedule the case for a rescission hearing. If the prisoner was confined in a federal prison at the time of the order retarding parole, the rescission hearing shall be scheduled for the next docket of parole hearings at the institution. If the prisoner was residing in a federal community treatment center or a state or local halfway house, the rescission hearing shall be scheduled for the first docket of parole hearings after return to a federal institution. When the prisoner is given written notice of the Board action regarding parole, he shall be given notice of the charges of misconduct to be considered at the rescission hearing. The purpose of the rescission hearing shall be to determine whether rescission of the parole grant is warranted. At the rescission hearing the prisoner may be represented by a person of his choice and may present documentary evidence.

(2) An institution discipline committee hearing conducted by the institution resulting in a finding that the prisoner has violated the rules of his confinement, may be relied upon by the Board as conclusive evidence of institutional misconduct.

(3) If the parole grant is rescinded, the prisoner shall be furnished a written statement of the findings of misconduct and the evidence relied upon.

(b)(1) Upon receipt of new information adverse to the prisoner regarding

matters other than institutional misconduct, the Board acting upon the procedures of § 2.17 may retard a previously granted parole and schedule the case for an institutional review hearing on the next docket of parole hearings or at the first docket of parole hearings following return to a federal institution.

(2) The prisoner shall be given notice of the nature of the new adverse information upon which the rescission consideration is to be based. The hearing shall be conducted in accordance with the procedures set out in §§ 2.12 and 2.13. The purpose of the hearing shall be to determine if the parole grant should be rescinded or if a new parole date should be established.

§ 2.38 Sponsorship of parolees; statement of policy.

It is the policy of the Youth Corrections Division to cooperate with groups desiring to serve as sponsors of parolees. In all cases, sponsors shall serve under the direction of and in cooperation with the probation officers to whom the parolees are assigned.

§ 2.39 Mandatory release in the absence of parole.

A prisoner shall be mandatorily released by operation of law at the end of the sentence imposed by the court less such good time deductions and extra good time deductions as he may have earned through his behavior and efforts at the institution of confinement. He shall be released as if on parole, under supervision until the expiration of the maximum term or terms for which he was sentenced less one hundred eighty days. Insofar as possible, release plans shall be completed before the release of any such prisoner.

§ 2.40 Same; youth offenders.

A prisoner committed under the Youth Corrections Act must be initially released conditionally under supervision not later than two years before the expiration of the term imposed by the court.

§ 2.41 Reports to police departments of names of parolees; statement of policy.

Names of parolees under supervision will not routinely be furnished to a police department of a community, except as required by law. All such notifications are to be regarded as confidential.

§ 2.42 Community supervision by United States Probation Officers.

(a) Pursuant to section 3655 of title 18 of the United States Code, United States Probation Officers are required to provide such parole services as the Attorney General may request. The Attorney General has delegated his authority in this regard to the Board (28 CFR 0.126(b)). In conformity with the foregoing, probation officers function as parole officers and provide supervision to parolees and mandatory releasees under the Board's jurisdiction.

(b) A parolee or mandatory releasee may be transferred to a new district of supervision with the permission of the probation officers of both the transferring and receiving district, provided such transfer is not contrary to instructions from the Board.

§ 2.43 Duration of period of community supervision.

(a) Any prisoner, with the exception of those sentenced prior to June 29, 1932, who is released under the provisions of laws relating to parole, shall continue until the expiration of the maximum term or terms specified in his sentence without deductions of allowance for good time. Prisoners sentenced prior to June 29, 1932, shall receive reductions in their maximum term or terms of imprisonment for such good time allowances as may be authorized by law.

(b) The Regional Director may discharge from supervision prior to the normal expiration date as provided in § 2.46(b), but the sentence is not thus commuted and such a parolee may be reinstated to supervision or retaken on the basis of a violator warrant.

(c) For certain narcotic offenses a prisoner will have a "special parole term" imposed by the court at the time of sentencing. The period of supervision under the basic sentence is served separately and must be completed prior to the beginning of any "special parole term." The "special parole term" will not be aggregated with the basic sentence for any purpose, including computation of time to serve following parole revocation, if any.

§ 2.44 Conditions of release.

The conditions of release are printed on the release certificate and are binding regardless of whether the releasee signs the certificate. The Board, or a member thereof, may add special conditions or

modify the conditions of release at any time.

§ 2.45 Travel by parolees and mandatory releasees.

(a) The probation officer may approve travel outside the district without approval of the Regional Director in the following situations:

(1) Vacation trips not to exceed thirty days.

(2) Trips, not to exceed thirty days, to investigate reasonably certain employment possibilities.

(3) Recurring travel across a district boundary, not to exceed fifty miles outside the district, for purposes of employment, shopping, or recreation.

(b) Specific advance approval by the Regional Director is required for other travel, including travel outside the continental limits of the United States, employment more than fifty miles outside the district, and vacations exceeding thirty days. A special condition imposed by the Regional Director prohibiting certain travel shall supersede any general rules relating to travel as set forth above.

§ 2.46 Supervision reports, modification and discharge from supervision.

(a) All parolees and mandatory releases shall make such reports to the United States Probation Officers to whom they have been assigned as may be required by the Board or Probation Officers. Probation Officers shall submit summary reviews of the progress of parolees and mandatory releasees according to Board policy. On the basis of summary reviews of the progress of parolees, the Regional Director may modify the reporting requirement of parolees or releasees.

(b) After the parolee or mandatory releasee has been under supervision for at least one year, the Regional Director may, in his discretion, permit the parolee to submit a written report to his probation officer on a less frequent basis than once a month. After a period of such reduced reporting the Regional Director may further order that the parolee be discharged from all supervision by the Probation Officer. In the latter instances, a parolee may be reinstated to supervision or a warrant may be issued for him as a violator at any time prior to the expiration of the sentence or sentences imposed by the court. Other modification in the reporting requirements may be

made by the Regional Director at any time during the parolee's term.

§ 2.47 Modification and discharge from supervision; youth offenders.

A committed youth offender may remain under supervision until the expiration of his sentence or he may be released from supervision or unconditionally discharged at any time after one year of continuous supervision on parole.

§ 2.48 Setting aside conviction.

When an unconditional discharge has been granted to a youth offender prior to the expiration of his maximum term of sentence, his conviction shall be automatically set aside and the Regional Director shall issue to the youth offender a certificate to that effect.

§ 2.49 Revocation of parole or mandatory release.

(a) If a parolee or mandatory releasee violates any of the conditions of his release, and satisfactory evidence thereof is presented to the Board, or a member thereof, a warrant may be issued and the offender returned to an institution. Warrants shall be issued or withdrawn only by the Board, or a member thereof.

(b) A warrant for the apprehension of any parolee shall be issued only within the maximum term or terms for which the prisoner was sentenced.

(c) A warrant for the apprehension of any mandatory releasee shall be issued only within the maximum term or terms for which the prisoner was sentenced, less one hundred eighty days.

§ 2.50 Same, youth offenders.

In addition to issuance of a warrant on the basis of violation of any of the condition of release, the responsible Regional Director may, when he is of the opinion that such youth offender would benefit by further treatment direct his return to custody or issue a warrant for his apprehension and return to custody. Upon his return to custody, such youth offender shall be given a revocation hearing under the same provisions as adult offenders as specified in § 2.54 to § 2.56. Following the revocation hearing parole may be reinstated, revoked or the terms and conditions thereof may be modified.

§ 2.51 Unexpired term of imprisonment.

The time a prisoner was on parole or mandatory release is not credited to the service of his sentence if revocation oc-

curs. When a warrant is issued the sentence ceases to run, but begins to run again when the releasee is taken into Federal custody by the execution of the Board's violation warrant. However, the sentences of prisoners committed under the Narcotic Addict Rehabilitation Act or the Youth Corrections Act run uninterrupted from the date of conviction without regard to any revocation, except as provided in § 2.10(c). In no case may the commitment of a person under the Federal Juvenile Delinquency Act extend past his twenty-first birthday.

§ 2.52 Execution of warrant; notice of alleged violations.

(a) Any officer of any Federal correctional institution, or any Federal officer authorized to serve criminal process within the United States, to whom a warrant shall be delivered shall execute such warrant by taking such prisoner and returning him to the custody of the Attorney General. The warrant shall be considered delivered to a Federal officer when the warrant is signed and placed in the mail at the Board headquarters or regional office before the expiration of the maximum term of sentence.

(b) On arrest of the prisoner the officer executing the warrant shall deliver to him a copy of the Warrant Application listing the alleged violations of parole or mandatory release upon which the warrant was issued.

(c) If execution of the warrant is delayed pending disposition of local charges, for further investigation, or for some other purpose, the parolee or mandatory releasee is to be continued under supervision by the probation officer until the normal expiration of the sentence, or until the warrant is executed, whichever comes first. Monthly supervision reports are to be submitted, and the releasee must continue to abide by all the conditions of release.

§ 2.53 Warrant placed as a detainer and dispositional interview.

(a) In those instances where the prisoner is serving a new sentence in an institution, the warrant may be placed there as a detainer. Such prisoner shall be advised that he may communicate with the Board relative to disposition of the warrant, and may request that it be withdrawn or executed so his violator term will run concurrently with the new sentence. Should further information be deemed necessary, the Regional Director

may designate a hearing examiner panel to conduct a dispositional interview at the institution where the prisoner is confined. At such dispositional interview the prisoner may be represented by counsel of his own choice and may call witnesses in his own behalf, provided he bears their expenses. He shall be given timely notice of the dispositional interview and its procedure.

(b) Following the dispositional review the Regional Director may:

(1) Let the detainer stand
(2) Withdraw the detainer and close the case if the expiration date has passed:

(3) Withdraw the detainer and reinstate to supervision; thus permitting the federal sentence time to run uninterrupted from the time of his original release on parole or mandatory release.

(4) Execute warrant, thus permitting the sentence to run from that point in time. If the warrant is executed, a previously conducted dispositional interview may be construed as a revocation hearing.

(c) In all cases, including those where a dispositional interview is not conducted, the Board shall conduct annual reviews relative to the disposition of the warrant. These decisions will be made by the Regional Director. The Board shall request periodic reports from institution officials for its consideration.

§ 2.54 Revocation by the Board, preliminary interview.

(a) A prisoner who is retaken on a warrant issued by a Board Member shall be given a preliminary interview by an official designated by the Regional Director to determine if there is probable cause to hold the prisoner for a revocation hearing and, if so, whether such revocation hearing should be conducted in the locality of the charged violation(s) or in a Federal institution. The official designated to conduct the preliminary interview may be a United States Probation Officer in the district where the prisoner is confined, provided he is not the officer who recommended that the warrant be issued.

(b) At the beginning of the preliminary interview, the hearing officer shall explain the Board's revocation procedure to the prisoner and shall advise the pris-

oner that he may have the preliminary interview postponed so that he may obtain representation by an attorney or may arrange for the attendance of witnesses. The prisoner shall also be advised that if he cannot afford to retain an attorney he may apply to a United States District Court for appointment of counsel to represent him at the preliminary interview and the revocation hearing. The prisoner may also request the presence of persons who have given information upon which revocation may be based. Such adverse witnesses shall be requested to attend the preliminary interview unless the prisoner admits a violation or has been convicted of a new offense committed while on supervision or unless the hearing officer finds good cause for their non-attendance. At the preliminary interview the hearing officer shall review the violation charges with the prisoner, receive the statements of witnesses and documentary evidence on behalf of the prisoner, and allow cross-examination of those adverse witnesses in attendance.

(c) At the conclusion of the preliminary interview, the hearing officer shall prepare and submit to the Regional Director a summary of the interview, which shall include recommended findings of whether there is probable cause to hold the prisoner for a revocation hearing. Upon receipt of the summary of the preliminary interview, the Regional Director shall either order the prisoner reinstated to supervision, order that a revocation hearing be conducted in the locality of the charged violation(s), or direct that the prisoner be transferred to a Federal institution for a revocation hearing.

(d) The prisoner shall be retained in local custody pending completion of the preliminary interview, submission of the summary of the hearing officer, and notification by the Regional Director relative to further action.

(e) A postponed preliminary interview may be conducted as a local revocation hearing, by an examiner panel or other hearing officer designated by the Regional Director provided that the prisoner has been advised that the postponed preliminary interview will constitute his final revocation hearing.

§ 2.55 Local revocation hearing.

(a) If the prisoner requests a local revocation hearing prior to his return to

a Federal institution, he shall be given a revocation hearing reasonably near the place of an alleged violation if the following conditions are met:

(1) The local hearing would facilitate the production of witnesses or the retention of counsel;

(2) The prisoner has not been convicted of a crime committed while under supervision; and

(3) The prisoner denies that he has violated any condition of his release. Otherwise, he shall be given a revocation hearing after he is returned to a Federal institution. However, the Regional Director may, on his own motion, designate a case for a local revocation hearing.

(b) If there are two or more alleged violations, the hearing shall be conducted near the place of the violation chiefly relied upon as a basis for the issuance of the warrant, as determined by the Regional Director.

(c) Following the hearing the prisoner shall be retained in custody until final action is taken relative to revocation or reinstatement, or until other instructions are issued by the Regional Director.

§ 2.56 Revocation hearing procedure.

(a) A revocation hearing shall be conducted by a hearing examiner panel or, in a local revocation hearing only, by another official designated by the Regional Director. In the latter case, the decision relative to revocation shall be made by an examiner panel on the basis of the hearing summary pursuant to the provisions of § 2.23. A revocation decision may be appealed under the provisions of § 2.25, § 2.26, or § 2.27 as applicable.

(b) The purpose of the revocation hearing shall be to determine whether the prisoner has violated the conditions of his release and, if so, whether his parole or mandatory release should be revoked or reinstated.

(c) The alleged violator may present voluntary witnesses and documentary evidence in his behalf. However, the presiding hearing officer or examiner panel may limit or exclude any irrelevant or repetitious statement or documentary evidence.

(d) If the alleged violator has not been convicted of a new criminal offense while under supervision and does not admit violation of any of the conditions of his

release, the Board shall, on the request of the alleged violator or on its own motion, request the attendance of persons who have given statements upon which revocations may be based. Those adverse witnesses who are present shall be made available for questioning and cross-examination in the presence of the alleged violator unless the presiding hearing officer or examiner panel finds good cause for their non-attendance.

(e) All evidence upon which the finding of violation may be based shall be disclosed to the alleged violator at the revocation hearing. The hearing officer or examiner panel may disclose documentary evidence by reading or summarizing the appropriate document for the alleged violator.

§ 2.57 Confidentiality of parole records.

To the end that the objectives and procedures of professionalized parole may be advanced and, more specifically so that the channels of information vital to sound parole actions may be kept open and that offenders released on parole may be protected against publicity deleterious to their adjustment, the following principles relating to the confidentiality of parole records shall be followed by the Board:

(a) Dates of sentence and commitment, parole eligibility dates, mandatory release dates, dates of termination of sentence and whether an inmate is being considered for parole, has been granted or denied parole, and if granted parole, the effective date set by the Board will be disclosed in individual cases upon proper inquiry by a party in interest.

(b) Who, if any one, has supported or opposed an application for parole may be revealed at the Board's discretion only in the most exceptional circumstances, with the express approval of such person(s) and after a decision relative to parole has been made.

(c) Other matters contained in parole records, including how a member votes relative to parole, will be held strictly confidential and will not be disclosed to unauthorized personnel.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1424

WILLIAM HARVEY JONES

v.

STEVE D. JOHNSTON, Executive
U.S. BOARD OF PAROLE, APPELLANT

(D.C. Civil 1211-72)

No. 74-1517

ARTHUR E. BYRD, et al., Individually
and on behalf of others similarly situated

v.

MAURICE J. SIGLER, Chairman, et al., APPELLANTS

DELBERT C. JACKSON, Director
Department of Corrections
District of Columbia, et al.

(D.C. Civil 2018-73)

Appeals from the United States District Court for the
District of Columbia

D.C. 20

Argued April 8, 1975

Decided March 23, 1976

Steven W. Snarr, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, *John A. Terry*, *Robert M. Werdig, Jr.*, and *Oscar Altshuler*, Assistant United States Attorneys, were on the brief, for appellants.

Robert Plotkin (appointed by this court), with whom *Dina Lassow* and *Richard Hand* were on the brief, for appellees.

Before *McGOWAN* and *ROBINSON*, Circuit Judges and *GUS J. SOLOMON*,* Senior United States District Judge for the District of Oregon.

Opinion for the court filed by Judge *McGOWAN*.

McGOWAN, Circuit Judge: These appeals present the question of when a prisoner serving a sentence for a crime committed while on parole, and against whom a parole violator warrant has been issued and lodged as a detainer, is entitled to a revocation hearing and determination upon request. The Government, appealing two District Court decisions,¹ insists that hearing and determination may be deferred until the intervening incarceration has terminated, although accepting the premise that the Constitution requires that a hearing ultimately be provided. We hold that this position does not measure accurately the reach of the Due Process Clause.

* Sitting by designation pursuant to Title 28 U.S. Code Section 294(d).

¹ *Jones v. Johnston*, 368 F. Supp. 571 (D.D.C. 1974); *Fitzgerald v. Sigler*, 372 F. Supp. 889 (D.D.C. 1974). The same conclusion was reached in *Sutherland v. District of Columbia Board of Parole*, 366 F. Supp. 270 (D.D.C. 1973).

I. BACKGROUND

A. No. 74-1517

The situations of the three appellees in No. 74-1517 (Fitzgerald, Kelley, and Byrd) are similar in all material respects.

Fitzgerald had been convicted of bank robbery in the Middle District of Pennsylvania in 1963, and after serving just over seven years of his ten year sentence received a mandatory "good-time credit" release pursuant to 18 U.S.C. §§ 4163, 4164 (1970).² On July 27, 1970, the U.S. Parole Board issued a parole violator warrant against him for failure to report for supervision; when Fitzgerald was arrested in March, 1971 and charged with robbery in the District of Columbia, the violator warrant was lodged against him as a detainer at his place of incarceration.³ On March 31, the Board updated the warrant to include an allegation of committing an offense while on parole. Fitzgerald pleaded guilty in District Court to robbery, 22 D.C. Code § 2901 (1973), and was sentenced on August 31, 1972 to three to twelve years, to run concurrently with any other sentence "that [he] . . . might be exposed to." 372 F. Supp. at 892.

² 18 U.S.C. § 4163 (1970) provides in pertinent part that "a prisoner shall be released at the expiration of his term of sentence less the time deducted for good conduct." A prisoner whose release is mandated by § 4163 prior to the expiration of the maximum term for which he was sentenced is deemed a parolee by § 4164: "A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days."

³ The purpose of a detainer is to inform the institution that the Parole Board intends to take the prisoner into custody as a parole violator at the completion of his sentence. See note 9 *infra*.

The detainer has remained lodged against him to the present, despite several requests by Fitzgerald that the Board hold a prompt revocation hearing. The Board has conducted a "dispositional review" * of his case, and has determined to take no action on the detainer until the intervening robbery sentence has been served and he has been taken into federal custody under the (executed) violator warrant.

Appellee Byrd was paroled on June 14, 1971 from a three to twelve year sentence imposed in 1965 for a robbery conviction. In September, 1971, he was arrested and charged with armed robbery, and was incarcerated in the District of Columbia jail where on November 11 a detainer based on the armed robbery charge was lodged against him. He pleaded guilty to armed robbery on July 6, 1972, and was sentenced to four to twenty years, to run concurrently with any other

* An affidavit of Maurice H. Sigler, Chairman, United States Board of Parole, describes the "dispositional review" as follows:

When the Board requests that a parole or mandatory release violator warrant be placed as a detainer against an alleged parole or mandatory release violator in custody as a result of a new criminal offense, the Board periodically conducts dispositional reviews of the warrant to determine whether the detainer should be allowed to remain in effect or whether the warrant should be withdrawn or executed. The initial dispositional review of a case is instituted by a request of the prisoner or on the Board's own initiative. It is presently the practice of the Board to conduct subsequent dispositional reviews of each case on an annual basis. If the warrant is executed, the Board will take action to conduct a prompt revocation hearing. In the dispositional review, which is based on the written record only, the Board specifically analyzes the factors enumerated in the attached Parole Form H-3(a), Summary by Case Analyst-Dispositional Review, in light of the prisoner's record as a whole.

sentence then being served. The detainer has remained lodged against him at Lorton Reformatory. Byrd's caseworker has requested that the Board take action on the detainer; the Board has responded that the detainer will remain on file, and that periodic dispositional reviews will be undertaken by the Board.

Kelley had received a twenty-five year sentence in 1963 for armed robbery of a post office, from which he was paroled in 1971. On June 23, 1972, he was sentenced in District of Columbia Superior Court to one to three years for attempted robbery, and a parole violator warrant was lodged against him as a detainer. On August 8, 1972, Kelley also was convicted in District Court of armed robbery, and received a sentence of from three to fifteen years, which he is now serving. As is the case with the other two appellants, the detainer has been allowed to stand against Kelley since his conviction. Kelley's prison caseworker submitted to the Board in August 1973 a letter from Kelley requesting action on his detainer, and the Board has advised him that it will conduct periodic dispositional reviews.

On November 7, 1973, Fitzgerald filed the instant action, alleging jurisdiction under 28 U.S.C. §§ 1361, 2241, 2255 (1970), and asking, *inter alia*, that the action be certified as a class action,⁵ that the parole violator warrant outstanding against him be quashed, and that the Board be required to hold speedy revocation hearings on all parole violator warrants placed against persons incarcerated for subsequent convictions.⁶

⁵ The District Court denied class action status, and appellees have not disputed this ruling.

⁶ The complaint also contained an action against the Director of the District of Columbia Department of Corrections and the Warden at Lorton, asking invalidation of Policy 5000 of the Department, which denied certain rehabilitation opportunities to prisoners solely on the ground that a detainer

On December 31, 1973, an amended complaint was filed in which Fitzgerald, Byrd and Kelley joined, essentially identical to Fitzgerald's complaint save that jurisdiction was based only on 28 U.S.C. §§ 1361, 2241 (1970). On March 13, 1974, the District Court ruled that (1) petitioners are "in custody" for the purposes of 28 U.S.C. § 2241, (2) the Board was constitutionally required to hold a final revocation hearing within a reasonable time after the detainees had been lodged and the parolees had been incarcerated pursuant to their convictions, and (3) as a consequence of the Board's delay, the detainees and warrants must be quashed. The appeal in No. 74-1517 is taken from these rulings.

B. No. 74-1424

On May 17, 1968, appellee Jones was convicted of housebreaking and grand larceny in the District Court, and was sentenced under the Narcotic Addict Rehabilitation Act (NARA), 18 U.S.C. § 4253 (1970), to an indeterminate term not to exceed ten years. He was released on parole in October of 1969, but five months later the Board of Parole issued a parole violator warrant charging him with failure to comply with the NARA aftercare program, violation of the Harrison Narcotic Act, falsifying a supervision report, and failure to report to his probation officer. That and a supplemental warrant were lodged against Jones at the District of Columbia Jail, where he was being held on a

was outstanding against them. During the pendency of the suit, the Department of Corrections adopted Policy 4090, which made a detainer only one of several criteria used in determining eligibility for rehabilitation opportunities. The parties thereupon entered into a stipulation that "[the petitioners] will not be denied a custody classification change solely because of the existence of outstanding detainers," and the judge found the Policy 5000 question to be moot. Appellees do not challenge this finding on appeal.

stolen vehicle charge. On January 18, 1971, Jones pleaded guilty to attempted unauthorized use of a motor vehicle, and was sentenced to one year with credit for time served; in September of that year he pleaded guilty to the narcotics offense, and was sentenced to five years imprisonment.

In October of 1971 Jones was transferred to Lorton, where the warrants were lodged against him. After a dispositional review in January, 1972, the Board chose to continue the detainer subject to periodic review. Jones filed the instant action six months later,¹ alleging that he had been denied access to certain rehabilitative programs as a result of the detainer, and in particular that he had been denied on-the-job training. Following a March, 1973 dispositional review at which the Board again permitted the detainer to continue in effect, Jones' attorney suggested that the dispute might be settled if the detainer were withdrawn to permit access to rehabilitative programs. The Board acquiesced and withdrew the detainer temporarily to allow Jones to participate in rehabilitative programs, with the understanding that the warrant again would be lodged shortly before the expiration of the intervening sentence. Jones then urged that the warrant be quashed because of the delay in holding a dispositional hearing. On January 9, 1974, the District Court granted Jones' request and ordered that the violator warrant be cancelled for failure to provide a prompt revocation hearing.

II. CUSTODY

Appellants argue that appellees are not "in custody"

¹ The action was filed June 16, 1972, but was dismissed on *res judicata* grounds. This court reversed the dismissal on April 30, 1973, and directed that the case be heard on the merits.

for the purpose of habeas corpus jurisdiction.⁹ This contention, which may have had merit under the "prematurity doctrine" of *McNally v. Hill*, 293 U.S. 131 (1934), has been repudiated by later cases. *Peyton v. Rowe*, 391 U.S. 54 (1968) (habeas will lie to challenge future sentence consecutive to that being served); *Smith v. Hooey*, 393 U.S. 374 (1969) (federal prisoner constitutionally entitled to speedy trial on pending indictment for offense under state law); *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973) (state prisoner is "in custody" for purpose of federal habeas corpus challenge to denial of his constitutional right under *Smith v. Hooey* to speedy trial on pending indictment in another state). We hold that a parole violator warrant lodged as a detainer¹⁰ represents sufficient "custody" of a parolee-prisoner to support habeas corpus jurisdiction under 28 U.S.C. § 2241.¹⁰

⁹ 28 U.S.C. § 2241(c)(3) (1970): "The writ of habeas corpus shall not extend to a prisoner unless . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . ."

¹⁰ The Board argues that Jones' case is different from that of the other three appellees since the detainer lodged against him has been withdrawn and therefore he cannot be said to be in custody for the purposes of § 2241. In *Braden, supra*, at 489 n.4, the Supreme Court reserved the question whether a detainer must be filed for a prisoner to be "in custody" under an indictment issued by another state. We are not faced, however, with a case in which no detainer ever was filed, and we do not address that situation. We believe that where, as here, the future custodian has actually lodged a detainer against a prisoner, thereby evidencing its intent to retake him at the end of his intervening confinement, the state of custody is not ended by a later temporary withdrawal of the detainer. Hence, Jones too is "in custody" for purposes of § 2241.

¹⁰ We note that the question whether a parolee-prisoner is "in custody" when a parole violator warrant has been lodged against him as a detainer has been answered in the affirma-

III. THE RIGHT TO A PROMPT HEARING

In *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the Supreme Court ruled that due process requires a "preliminary" and "final" hearing for revocation of parole or probation. The parties here agree that the need for the preliminary, or "probable cause" hearing is eliminated in these cases by the conviction on the violation charged. The matter in dispute is the timing of the final hearing —may it be delayed until the intervening sentence has been served, or is there a due process right to a determination of an outstanding detainer within a reasonable time after conviction on an intervening charge?¹¹

tive, either expressly or by implication, by all of the circuits presented with the situation. *Gaddy v. Michael*, 519 F.2d 699 (4th Cir. 1975), *petition for cert. filed*, (Aug. 5, 1975) (No. 75-5215); *Cook v. United States Attorney General*, 488 F.2d 667 (5th Cir. 1974)), *cert. denied*, 419 U.S. 846 (1974); *United States ex rel. Hahn v. Revis*, 520 F.2d 632 (7th Cir. 1975) (mandate withdrawn); *Cleveland v. Ciccone*, 517 F.2d 1082 (8th Cir. 1975); *Reese v. United States Board of Parole*, No. 74-2418 (9th Cir. Jan. 12, 1976); *Small v. Britton*, 500 F.2d 299 (10th Cir. 1974). See also *Orr v. Saxbe*, No. 75-1042 (3d Cir. June 17, 1975), *petition for cert. filed* (Oct. 10, 1975) (No. 75-5594), *aff'g Civ. No. 74-341* (M.D. Pa. Nov. 27, 1974); *Colangelo v. United States Board of Parole*, No. 75-1249 (6th Cir. July 16, 1975), *aff'g Civ. No. C 74-251* (N.D. Ohio Dec. 11, 1974).

¹¹ Our discussion is narrowed by three considerations. First, the parties concur that the Board may delay the revocation hearing until after completion of a trial for the conduct charged in the violator warrant. See generally *Shelton v. United States Board of Parole*, 388 F.2d 567, 572 (D.C. Cir. 1967). Second, it is agreed that the right to a prompt hearing may be waived, and that the Board therefore is required only to provide a prompt hearing upon a proper request; if no request is made, the timing of the hearing is wholly within the Board's discretion. Finally, appellees ask only that the

Questions of procedural due process require a two-step analysis: first, does the deprivation under challenge constitute a denial of liberty or property within the meaning of the due process clause, and second, if so, upon consideration of the private and governmental interests implicated, is the deprivation unconstitutional? *E.g.*, *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972), *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). As to the first half of this analysis, the Court in *Morrissey* found that a parolee's interest in not being incarcerated solely on the basis of an executed parole violator warrant was cognizable under the due process clause.

The instant appeals do not involve prisoners who would be free but for the actions of the Parole Board. We believe, however, that a parolee-prisoner need not assert an interest in immediate liberty to claim the constitutional guarantee of due process. In *Wolff v. McDonnell*, 418 U.S. 539 (1974), prison disciplinary proceedings were found to threaten sufficient deprivation (loss of good time credits) to warrant those due process guarantees which would not impair the internal security interests of the prison.¹² And, in *Smith v. Hooey*, 393

Board be required to hold a hearing and announce a decision. They do not challenge, and we do not rule on, the Board's right to postpone the effect of that decision until after the parolee-prisoner has served the intervening sentence. As noted below, slip opinion pp. 24-25 & n.31 *infra*, this last agreement does not foreclose inquiry into the problem of concurrent *vs.* consecutive sentences—the parolee may believe that a prompt hearing will improve his chances of convincing the Parole Board to let the sentences run concurrently.

¹² That the revocation of parole be justified and based on an accurate assessment of the facts is a critical matter to the State as well as the parolee; but the procedures by which it is determined whether the conditions of parole have been breached do not themselves threaten other important state interests, parole officers, the police, or witnesses—at least no more so than in the case of the

U.S. 374 (1969), the Court noted strong prisoner interests in accuracy, certainty, and the possibility of earlier release in ruling that an accused retained the Sixth Amendment right to a speedy trial despite incarceration for conviction on another charge:

At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from 'undue and oppressive incarceration prior to trial.' But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail on an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed. Secondly, under procedures now widely practiced, the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him.

And while it might be argued that a person already in prison would be less likely than others to be affected by 'anxiety and concern accompanying

ordinary criminal trial. Prison disciplinary proceedings, on the other hand, take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. . . . They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life. . . .

It is against this background that disciplinary proceedings must be structured by prison authorities, and it is against this background that we must make our constitutional judgments, realizing that we are dealing with the maximum security institution as well as those where security considerations are not so paramount.

418 U.S. at 561-62.

public accusation,' there is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a prisoner as upon a person who is at large. . . . In the opinion of the former Director of the Federal Bureau of Prisons,

[I]t is in their effect upon the prisoner and our attempts to rehabilitate him that detainers are most corrosive. The strain of having to serve a sentence with the uncertain prospect of being taken into the custody of another state at the conclusion interferes with the prisoner's ability to take maximum advantage of his institutional opportunities. His anxiety and depression may leave him with little inclination toward self-improvement.

Finally, it is self-evident that 'the possibilities that long delay will impair the ability of an accused to defend himself' are markedly increased when the accused is incarcerated in another jurisdiction.

395 U.S. at 378-79. Although we recognize that *Smith v. Hooey* is not a "due process" case, it is our view that a prisoner's interest in a speedy trial while incarcerated on another charge is in many ways similar to the interest in a prompt parole revocation hearing in the instant case. The guarantee of due process is surely not so narrow or inflexible as to exclude from its protection the interests—described in more detail at slip opinion pp. 14-27 *infra*—asserted by appellees.

We thus turn to considering whether those interests in a prompt hearing, when judged against the Government's asserted interests in delaying the hearing until the intervening incarceration has ended, require the relief appellees seek. We begin by noting that the Government's argument seems to us overstated in one important respect. We believe it is clear—and it may be that the Government would not contend otherwise—that due process requires that a revocation hearing be held

sufficiently before the end of the intervening incarceration so that, if the decision of the Board is not to revoke parole, unnecessary incarceration is avoided. Otherwise, a prisoner might be taken into custody after his intervening sentence had expired and pending the Parole Board's determination; and, if that determination were not to revoke parole, the prisoner would have been incarcerated for a not insignificant period of time and with absolutely no justification. Incarceration is always a drastic step, and one's interest in avoiding such a deprivation is of "transcending value." *In re Winship*, 397 U.S. 358, 364 (1970); *Speiser v. Randall*, 357 U.S. 573, 525 (1958). There is no reason of substance why the Government could not provide a revocation hearing in time to reach a decision before the intervening sentence has expired.¹³ and we think it clear that

¹³ As is discussed more fully below, the Board has only two interests in delaying the provision of a parole revocation hearing. The first, the "administrative interest," has two parts: (A) the burden of holding hearings in distant state prisons where parole violators may be incarcerated on their intervening sentences, and (B) the cost of additional hearings when the Board decides to reevaluate a decision based on prison behavior during the intervening sentence. The second interest—the "oversight interest"—is in ensuring the ability to consider the parolees' interim institutional performance in deciding whether to revoke parole at the end of the intervening sentence. It should be clear that both the second interest and Part B of the first interest are virtually non-existent when the hearing is to be moved forward only far enough to ensure its completion before the expiration of the intervening sentence. As for part A of the first interest, we do not believe it substantial, for reasons stated at slip opinion pp. 28-30 *infra*; and we further note that in cases where the decision after hearing is not to revoke parole, the Government may reap the savings of not having to transport the prisoner from one institution to another or to bear the costs of his confinement while the Board's decision is pending. It is clear, then, that the Government can put forth no interest approaching "transcending value" to justify not scheduling the hearing so as to avoid unjustified incarceration.

it is required to do so upon request by a parolee-prisoner.¹⁴

Against that background, the narrow legal question raised by the circumstances of these appeals is highlighted: Are prisoners in appellees' situation entitled to a prompt hearing, or may the Government defer the hearing that must eventually be provided until shortly before the expiration of the intervening sentence? To answer this question we must analyze the private and Government interests in the timing of the hearing.

A. *The Prisoner's Interests*

When, as in these cases, the fact of parole violation has been established by a criminal conviction, the parole revocation hearing does not thereby lose its significance. As the Supreme Court noted in *Morrissey v. Brewer*, the Parole Board must determine not only whether there has been a violation, but also whether that violation justifies revocation of parole:

The first step in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole. The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation? The first step is relatively simple; the second is more complex.

408 U.S. at 479-80. The Court later indicated, in *Gagnon v. Scarpelli*, that a parole board should exercise its

¹⁴ We intimate no view on the question whether the Board is constitutionally required to do so absent a specific request.

discretion to appoint counsel for a probation or parole violator who has substantial evidence in mitigation of the violation to present at the revocation hearing:

Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.

411 U.S. at 790 (emphasis added).¹⁵

¹⁵ See also *Cooper v. Lockhart*, 489 F.2d 308, 315-16 (8th Cir. 1973); *Caton v. Smith*, 486 F.2d 733, 735 (7th Cir. 1973) ("Breach of parole conditions is a necessary but not sufficient ground for parole revocation, for the board is required to determine whether the violator is still a good parole risk, and he may bring extenuating factors to the board's attention."). This court repeatedly has recognized that the dispositional determination is separate from the violation determination. See, e.g., *Hyser v. Reed*, 318 F.2d 225, 240 (*en banc*), cert. denied *sub nom. Jamison v. Chappell*, 375 U.S. 957 (1963); *Shelton v. United States Board of Parole*, *supra*, 388 F.2d at 575-76. In the *Shelton* decision, this court noted that an intervening conviction obviated the need for a preliminary "probable cause" parole revocation hearing, 388 F.2d at 575, but did not reach the question whether a final hearing must be held within a reasonable time, 388 F.2d at 576. The reasoning of Judge Gesell in *Sutherland v. District of Columbia Board of Parole*, *supra*, 366 F. Supp. at 272, is particularly apposite to this issue:

The D.C. Board of Parole, like the United States Parole Board under discussion in *Shelton*, retains full discretion to place a parolee back on the street even though he has clearly violated the conditions of his parole. See D.C. Code § 24-206; 18 U.S.C. § 4207. The Board must con-

Clearly, the final revocation proceeding is a matter of great consequence even to a prisoner whose violation has been established by a criminal conviction.¹⁶ The question

sider mitigating circumstances and rehabilitative potential as well as the existence of parole violations before determining that reincarceration is appropriate. . . . Thus, a revocation hearing to adduce evidence on these matters is of vital importance even to a parolee whose parole violation has already been established by a court of law.

¹⁶ The Parole Board's regulations expressly provide for withdrawal of a detainer lodged against a parolee incarcerated under a new sentence. The pertinent regulation, 28 C.F.R. § 2.53, provides as follows:

(a) In those instances where the prisoner is serving a new sentence in an institution, the warrant may be placed there as a detainer. Such prisoner shall be advised that he may communicate with the Board relative to disposition of the warrant, and may request that it be withdrawn or executed so his violator term will run concurrently with the new sentence. Should further information be deemed necessary, the Regional Director may designate a hearing examiner panel to conduct a dispositional interview at the institution where the prisoner is confined. . . .

(b) Following the dispositional review the Regional Director may:

(1) Let the detainer stand;

(2) Withdraw the detainer and close the case if the expiration date has passed;

(3) Withdraw the detainer and reinstate to supervision; thus permitting the federal sentence time to run uninterruptedly from the time of his original release on parole or mandatory release.

(4) Execute warrant, thus permitting the sentence to run from that point in time. If the warrant is executed, a previously conducted dispositional interview may be construed as a revocation hearing.

(c) In all cases, including those where a dispositional interview is not conducted, the Board shall conduct an

then becomes what interests the parolee has in having a decision as to the disposition of his parole revocation proceeding—*i.e.*, whether parole will be revoked and, if so, whether revocation will result in imprisonment beyond the expiration of the intervening sentence—made promptly rather than at the end of his intervening sentence. We perceive four categories of interest: accuracy in the determination, certainty of future disposition, access to privileges and rehabilitation programs during the intervening sentence, and potential for earlier release.

1. Accuracy in the determination.

The parole revocation hearing is a fact-finding process of extremely broad scope.¹⁷ Among the factors that the Board can consider at that hearing, two of the most important from the viewpoint of the parolee-prisoners are mitigating factors attending the violation¹⁸ and per-

nual reviews relative to the disposition of the warrant.

The common practice apparently is to take alternative (1), and to let the detainer stand. In an affidavit filed with the District Court, Maurice Sigler, Chairman of the United States Board of Parole, reported as follows with regard to the disposition of parole violator warrants lodged as detainers:

Based on available records, during the last four months of 1973, 30 such cases arose for dispositional review by the Adult Division by the Board. As a result of those dispositional reviews, the Board ordered in 20 cases that the detainer should remain in effect. In 6 cases the Board ordered that the warrant be executed. In 4 cases the Board ordered that the warrant should be withdrawn and the case closed.

App. 40, 41.

¹⁷ 28 C.F.R. § 2.19 contains a non-exclusive list of ten possible categories of consideration.

¹⁸ *Id.* § 2.19(b) (2).

sonal and social history in the community.¹⁹ The parolee consequently may wish to learn of the Board's information on his behavior and, when appropriate, to challenge that information by presenting his own evidence and witnesses.²⁰

The *Morrissey* decision was grounded in part on the need to protect the fairness and integrity of the parole process;²¹ and, as we have noted, express recognition was given in *Gagnon v. Scarpelli* to the importance of evidence in mitigation of an offense.²² Delaying the hearing for the period involved in the intervening sentence may seriously prejudice a parolee's ability to present accurately his side of the story, whether or not a violation

¹⁹ *Id.* § 2.19(e).

²⁰ We note, for instance, that in some cases the Parole Board may provide a revocation hearing reasonably near the place of an alleged violation if the "local" hearing would facilitate production of witnesses or retention of counsel and if the parolee denies that any violation was committed. *Id.* § 2.55 (a). For similar reasons, a parolee incarcerated in a state institution near his home on an intervening sentence may be able to defend himself better in a revocation hearing held at the state institution than at one held after his removal to a federal institution. See *Argro v. United States*, 505 F.2d 1374 (2nd Cir. 1974).

²¹ The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions. . . . And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.

408 U.S. at 484.

²² See slip opinion p. 15 *supra*.

has been established conclusively.²³ To begin with, the passage of time can make it more difficult for the parolee-prisoner to obtain evidence and testimony bearing on both mitigating factors and reputation in the community. And even assuming that the necessary witnesses can eventually be located, there is the inescapable prejudice that accompanies impaired recollection. Since the prejudice that may be caused by delay will often be difficult to demonstrate at the time of the delayed hearing, we think the interest of the parolee-prisoner in a prompt hearing is entitled to considerable weight.

The Board suggests that its disposition will be more accurate if it is able to consider the parolee's conduct in the prison during his intervening confinement. It is our understanding that the Board retains this power in any event, for it may reconsider at any time a decision to revoke parole and, specifically, may alter its planned disposition because of interim prison behavior.²⁴

²³ See *Boswell v. United States*, 128 U.S.App.D.C. at 315-19, 388 F.2d at 571-75 (one of the appeals consolidated with *Shelton v. United States Board of Parole*, *supra*). In *Boswell*, the parolee was denied a revocation hearing while imprisoned on an intervening conviction despite the fact that the alleged violation was unrelated to the crime for which he was sentenced. Noting in that situation that "one of the requirements of basic fairness is a prompt hearing where the alleged violator can contest the fact of violation and adduce whatever witnesses he may have to support his claim of innocence," the court found that the Parole Board was obligated to provide a hearing within a reasonable time:

We think the issuance of a violator warrant triggers a process which, as a matter of fundamental fairness, must be pursued with reasonable diligence and with reasonable dispatch.

388 F.2d at 574. Delay may also work unfairness, of course, when it impairs a parolee-prisoner's ability to present collateral evidence in a request for leniency.

²⁴ This is so because the Board may reopen a case at any time for further consideration. 28 C.F.R. § 2.28. And

In addition to the evidentiary interests discussed above, the parolee validly may conclude that he has an interest in establishing the Board's opinion of his conduct and potential at the start of the intervening confinement, so that any later change in the disposition must be justified specifically by the institutional conduct.

2. *Certainty of future disposition.*

The parolee also has a definite, personal interest in being relieved of uncertainty as to what his future will be. As noted above, the Supreme Court recognized in *Smith v. Hooey*²⁵ that the anxiety and depression result-

as to subjects open to consideration, *id.* § 2.19 provides in relevant part:

In the exercise of its discretion, the Board generally considers some or all of the following factors and such others as it may deem appropriate:

* * *

(d) Changes in motivation and behavior:

- (1) Changes in attitude toward self and others;
- (2) Reasons underlying changes;

(3) Personal goals and description of personal strength or resources available to maintain motivation for law abiding behavior.

* * *

(f) Institutional experience:

- (1) Program goals and accomplishments:
 - (i) Academic;
 - (ii) Vocational education, training or work assignments;
 - (iii) Therapy.
- (2) General adjustment:
 - (i) Inter-personal relationships with staff and inmates;
 - (ii) Behavior, including misconduct.

²⁵ 393 U.S. 374 (1969).

ing from a detainer based on a pending criminal indictment may have a severely corrosive effect on rehabilitation.²⁶ We have no reason to believe that the effects are any the less significant when the detainer is lodged because of a parole violation.²⁷ That the appellees have not challenged the Board's power to withhold the execution of a revocation decision until the completion of the intervening sentence, and to alter an adverse parole revocation decision on the basis of interim prison behavior, does not gainsay the increased certainty that results from a hearing and decision on the pending detainer.

In the first place, we note that the asserted power of the Board to withhold execution of a revocation decision has no effect on the certainty interest of parolee-

²⁶ See slip opinion pp. 11-12 *supra*. We also note that the corrosive effect of uncertainty on prisoners has been one of the factors stressed by the increasing number of commentators critical of indeterminate sentences. *See, e.g.*, M.E. Frankel, *Criminal Sentences—Law Without Order* 96-97 (1972) ("[I]t is pertinent again to recall how deeply we prize certainty and predictability in the workings of the law. We want to be able to plan our businesses and family decisions by knowing in advance just how painful the tax will be, what the zoning laws promise, how long an employment contract will endure. It may be imagined that knowing the actual length of a prison term might serve similar . . . needs."); J. Mitford, *Kind and Usual Punishment* 82 (1973) ("[T]he indeterminate sentence [is] a potent psychological instrument for inmate manipulation and control, the 'uncertainty' ever nagging at the prisoner's mind a far more effective weapon than cruder ones. . . .").

²⁷ See *Cooper v. Lockhart*, 489 F.2d 308, 314-15 (8th Cir. 1973); *Sutherland v. District of Columbia Board of Parole*, 366 F. Supp. 270, 272 (D.D.C. 1973). *See also, Lawrence v. Blackwell*, 298 F. Supp. 708, 713-15 (N.D. Ga. 1969) (detainers based on pending indictments); Bennett, "The Last Full Ounce," 23 Fed. Prob. No. 2, at 20 (1959); Note, Detainers and the Correctional Process, 1966 Wash. U.L.Q. 417, 421 at n.22.

prisoners as to whom the Board has made a final decision to withdraw the warrant. In those cases, only subsequent prison conduct constituting a parole violation would justify a later decision by the Board to revoke parole. Moreover, as to those parolee-prisoners who have received an adverse parole revocation decision, we note that consecutive sentences and the ability of the Parole Board to advance or retard previously fixed parole dates are aspects of prison life we have neither the desire nor the ability to affect. A prompt revocation hearing thus nevertheless serves an important "certainty" interest of the prisoner.

3. Access to rehabilitative programs.

A detainer lodged against a prisoner may have a particularly damaging effect if it results in denial of access to educational or rehabilitative programs. This issue has been mooted to some extent in the instant case by stipulation of the parties after the District of Columbia Department of Corrections issued new guidelines for the "inmate custody classification" which determines access to various programs.²⁸ A detainer no longer will

²⁸ The new policy contained in Notice 4090 lists twelve "criteria" which will be considered in inmate custody classification: "(a) the nature and seriousness of the offense; (b) sentence structure; (c) prison breach; (d) institutional adjustment; (e) family and community ties and support; (f) prognosis for adjustment in outside institutional assignments and community program [sic]; (g) psychological status, mental and emotional stability; (h) pending case; (i) detainer; (j) forfeiture of statutory good time; (k) prison breach [sic; see (c)]; (l) disciplinary action."

That a prisoner may have a substantial interest in the removal of a detainer even when the detainer is only one factor considered by the Parole Board was noted by James V. Bennett, a former Director of the Federal Bureau of Prisons:

[Continued]

bar admission to rehabilitative programs *automatically*; it will be only one of a large number of factors considered in the classification decision.

We note, however, that even under the new policy a prisoner may have a substantial interest in the removal of a detainer lodged against him. The detainer will continue to be a consideration, and the inmate may never know whether his custody classification might have been changed had there been no detainer.²⁸ The potential for prejudice thus created may be of great concern to the

²⁸ [Continued]

While detainees reduce the incentive for the prisoner to attempt to improve himself, they also affect the institution's readiness to allow an inmate full participation in the program. . . . Today the prisoners with detainees are evaluated individually but there remains a tendency to consider them escape risks and to assign them accordingly. In many instances this evaluation and decision may be correct, for the detainer can aggravate the escape potentiality of a prisoner.

"The Last Full Ounce," 23 Fed. Prob. No. 2, at 21 (1959).

²⁹ The possible consequences of a detainer were outlined in Gay v. United States Board of Parole, 394 F. Supp. 1374, 1377 (E.D. Va. 1975):

First, the presence of the federal detainer imposes substantial constraints upon a parolee's liberty even when the parolee is incarcerated on a state charge. If the parolee is incarcerated while awaiting trial on the state charges, he may be unable to make bond because of the detainer. If the parolee is convicted on the state charge and incarcerated in the state correctional system, he may be denied the privilege of participating in certain rehabilitative programs, such as furlough and work release, because of the presence of the federal detainer. A prisoner with a federal detainer can never be assigned to trusty status, nor assigned to a job where the level of custody is low. . . . The presence of a federal detainer "unquestionably" affects a state prisoner's eligibility for parole.

prisoner, and creates a substantial interest in a reasonably prompt revocation hearing.³⁰

4. *Opportunity for earlier release.*

Finally, a prompt hearing and decision would give the parolee-prisoner an opportunity to obtain earlier release from prison. The Board argues that, given its power to delay execution of the warrant following a revocation decision, any benefits of an early decision in the concurrent sentence situation are illusory. There are two answers to this contention.³¹

First, the fact that the judge who imposes the intervening sentence cannot impose on the Board a requirement that the intervening sentence run concurrently

³⁰ The Board argues that Jones' interests in a prompt hearing are reduced because the detainer has been withdrawn and consequently there are no adverse effects from that detainer. We agree that the amount of deprivation suffered by an inmate is less when a detainer has been removed. The interests of the parolee in accuracy, certainty, and possible earlier release, however, remain, and we are persuaded that the Board should not be able to subvert the instant decision by withdrawing a violator warrant that has been issued and reissuing it years later for the same offense.

³¹ Preliminarily, we note that the fact that the Board *can* delay execution does not mean that it will, and presumably there are certain situations in which the Board will find delay inappropriate. For example, the parolee's ability to present a case for prompt execution by the Board may be hampered severely by the effects of delay. Thus, the Seventh Circuit found in *United States ex rel. Hahn v. Revis*, 520 F.2d 632 (7th Cir. 1975) (mandate withdrawn) (discussed *infra*) that a parolee-prisoner may have a substantial interest in a timely opportunity to convince the Board that his sentences *should* be permitted to run concurrently. We treated this interest in accuracy of the Board's determination at slip opinion pp. 17-20 *supra*.

with the original sentence³² does not mean that the judge is powerless to enforce his intent as to the total sentence to be served. If the Board announces its decision to revoke parole, but to force the original and intervening sentences to run consecutively by delaying execution of the warrant, the parolee then could return to the sentencing judge to request a reduction in sentence to approximate the original intended result.³³ Insofar as the Board may seek to deny effect to the sentencing judge's intent that the sentences run concurrently, the parolee has a very great interest in obtaining a revocation decision so that he can return to the court and request a modification of his sentence.

Second, a parolee validly may conclude that an outstanding detainer will lessen his chances of securing parole from the intervening sentence. See *Gay v. United States Board of Parole*, 394 F. Supp. 1374, 1377 (E.D. Va. 1975) ("The presence of a federal detainer 'unquestionably' affects a state prisoner's eligibility for parole."); *United States ex rel. Hahn v. Revis*, 520 F.2d 632, 637 (7th Cir. 1975) (mandate withdrawn); *Cooper v. Lockhart*, 489 F.2d 308, 314 n.10 (8th Cir. 1973). A decision not to revoke would remove the detainer and thereby aid his efforts to be released from the intervening sentence; a decision to revoke, and to impose consecutive sentences, may influence the intervening custodian to consider a plea for earlier release.

As we have noted several times, an early adverse decision will not result in a fixed future course; the Board remains able to change its determination based on information later received. It is clear, however, that the possi-

³² See *Tippitt v. Wood*, 140 F.2d 689 (D.C. Cir. 1944); *Mock v. U.S. Board of Parole*, 345 F.2d 737 (D.C. Cir. 1965).

³³ *Tippitt v. Wood*, *supra*, 140 F.2d at 692; *Mock v. U.S. Board of Parole*, *supra*, 345 F.2d at 739.

bility of a future change in disposition is but a factor affecting the weight of the interests in certainty and earlier release, and by no means eliminates them. In *Wolff v. McDonnell*, discussed above, the Supreme Court granted to prisoners facing loss of good time credits in disciplinary hearings those due process rights which were compatible with the serious internal security and administrative interests of the prison officials. The Court expressly held that, although the deprivation of good time credits has uncertain future effect,³⁴ still it is a deprivation which must be preceded by whatever elements of a fair hearing are practicable in the situation. 418 U.S. at 560-61.

Although the interest in earlier release is concededly substantial, the Board repeatedly has expressed its belief that, in general, a parolee will obtain a better disposition if he receives the delayed hearing. We cannot accept the Board's assertion that a parolee's desire to have a prompt hearing should be submerged in reliance on the benevolent intent of the parole officers. As the Supreme Court noted in *Gagnon v. Scarpelli, supra*:

[A]n exclusive focus on the benevolent attitudes of those who administer the probation/parole system when it is working successfully obscures the modifi-

³⁴ For the prison inmate, the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee. The deprivation, very likely, does not then and there work any change in the conditions of his liberty. It can postpone the date of eligibility for parole and extend the maximum term to be served, but it is not certain to do so, for good time may be restored. Even if not restored, it cannot be said with certainty that the actual date of parole will be affected; and if parole occurs, the extension of the maximum term resulting from loss of good time may affect only the termination of parole, and it may not even do that.

cation in attitude which is likely to take place once the officer has decided to recommend revocation. Even though the officer is not by this recommendation converted into a prosecutor committed to convict, his role as counsellor to the probationer or parolee is then surely compromised.

411 U.S. at 785.

B. The Board's Interests

The Parole Board primarily has argued in these cases that a prisoner-parolee does not have a substantial interest in a prompt revocation hearing, rather than asserting an affirmative interest in delay. The Board has, however, emphasized its "punishment" interest in delaying execution of a warrant to lengthen total imprisonment, an "administrative" interest in avoiding travel to distant places of incarceration and duplicative hearings, and an "oversight" interest in consideration of prison conduct during the intervening sentence.

Appellees have not challenged the ability of the Board to delay the implementation of a revocation decision so as to have the intervening and (the unserved portion of) the original sentence run consecutively. Their asserted interest is in the prompt decision alone; the Board's "punishment" interest in delaying execution therefore is not material.³⁵ As a result, we must consider the Board's "administrative" and "oversight" interests in delay.

³⁵ Compare *United States ex rel. Hahn v. Revis*, *supra*, in which a federal detainer was lodged against a state prisoner who was serving both a four-month state sentence for acts done while on parole from the federal sentence, and a longer state term for crimes committed prior to his federal sentence. The Court of Appeals held that the *Zerbst* case would justify a delay in execution of the detainer only until the four-month "intervening" state sentence was completed:

In *Zerbst v. Kidwell*, 304 U.S. 359, 362-63, 58 S.Ct. 872, 82 L.Ed. 1399 (1938), the Supreme Court identified

1. Administrative Interests.

The Board might assert two administrative interests in delaying revocation hearings until the completion of intervening sentences: (1) the difficulty and expense of conducting hearings in distant state prisons where parole violators may be incarcerated on their intervening sentences;²⁶ and (2) the cost of additional hearings when the Board decides to re-evaluate a decision made at the commencement of an intervening sentence on the basis of prison behavior.

The transportation problem is not unique to the parolee imprisoned for a new sentence. The Supreme Court in *Morrissey v. Brewer* also faced the problem of parolees under supervision in a distant state, yet due process was held to require a preliminary hearing "reasonably near the place of the alleged parole violation" before removal to the original place of imprisonment for a final revocation hearing. 408 U.S. at 485. The Court had occasion

a policy reason why the unexpired term of a parole violator should not begin to run from the date he is 'imprisoned for a new and separate offense' so that 'a parole violator can be required to serve some time in prison in addition to that imposed for an offense committed while on parole.' Although the question presented in *Zerbst* arose out of an intervening federal sentence, the philosophy expressed would equally justify delay in execution of a federal parole violation warrant until termination of imprisonment for a state offense committed during release on parole. In the instant case, however, petitioner's sentence for the state offense committed on parole was only four months, ending at the latest in October, 1973. The *Zerbst* philosophy would be irrelevant after that point, since his continued state imprisonment was the result of conduct which took place before his federal sentence was imposed.

520 F.2d at 636.

²⁶ This is, of course, not the case here.

in *Gagnon v. Scarpelli* to respond to assertions of practical difficulties caused by the *Morrissey* decision:

Petitioner argues, in addition, that the *Morrissey* hearing requirements impose serious practical problems in cases such as the present one in which a probationer or parolee is allowed to leave the convicting State for supervision in another State. Such arrangements are made pursuant to an interstate compact adopted by all of the States. . . .

Some amount of disruption inevitably attends any new constitutional ruling. We are confident, however, that modification of the interstate compact can remove without undue strain the more serious technical hurdles to compliance with *Morrissey*. An additional comment is warranted with respect to the rights to present witnesses and to confront and cross-examine adverse witnesses. Petitioner's greatest concern is with the difficulty and expense of procuring witnesses from perhaps thousands of miles away. While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence. Nor did we intend to foreclose the States from holding both the preliminary and the final hearings at the place of violation or from developing other creative solutions to the practical difficulties of the *Morrissey* requirements.

411 U.S. at 782 n.5. Given the procedural flexibility of the hearing required by *Morrissey*, we are unpersuaded that the transportation interest is a substantial objection to a requirement of prompt revocation hearings.³⁷ In

³⁷ See also *Smith v. Hooey*, *supra*, 393 U.S. at 380 n.11, in which the Court rejected a claim that there were practical problems in transporting a prisoner to another state to stand trial on a pending indictment.

fact, the Board's own regulations reflect the need for a certain degree of procedural flexibility despite the additional expense; as we noted earlier, the regulations authorize holding a revocation hearing reasonably near the place of an alleged violation if the "local" hearing would facilitate production of witnesses or retention of counsel and if the parolee denies that any violation was committed. 28 C.F.R. § 2.55(a); *see note 20 supra.*

Present practice is for the Board to hold annual dispositional reviews of outstanding unexecuted warrants lodged as detainees.²⁸ It therefore would not appear to be a substantial additional burden to require a prompt revocation hearing, nor does it appear that an end-of-sentence "re-evaluation" hearing would require greater expense than the current system. Indeed, we note that the expense of such a "re-evaluation" hearing applies only to those parolee-prisoners who have received *adverse* revocation decisions. Moreover, the Government is spared the expense of dispositional reviews for those parolee-prisoners who have received favorable parole revocation decisions.

Perhaps most to the point, however, is the fact that the transportation burden would have to be assumed in any event. For, as we noted above, it seems plain that a hearing has to be held sufficiently before the expiration of the intervening sentence to eliminate the risk of unjustified incarceration. *See* slip opinion pp. 12-14 *supra*. The question is merely one of the timing of a hearing that must to some degree precede the expiration of that sentence, and the Board has no interest whatsoever in postponing the burden of transportation whose assumption is ultimately inevitable.²⁹

²⁸ 28 C.F.R. § 2.53(c), reprinted in pertinent part at note 16 *supra*.

²⁹ We recognize that deferring that burden gives the Board the economic advantage of reaping the benefit of use of the

2. *The Oversight Interest*

Appellants argue that the Parole Board should have discretion to delay the final hearing to enable it to "consider the record of the parolee's interim institutional performance in determining whether to revoke the parole at the end of the intervening sentence or to continue or modify the parole status." (Appellants' Br. at 28). In essence, the Board seeks to condense two determinations into one. The first determination is whether, on the basis of the facts underlying the violator warrant, parole should be revoked; the second is whether events during the intervening incarceration warrant a different disposition. Many parolees may wish that the Board make this combined decision, believing that they may avoid revocation through good behavior in prison. We do not, however, deny them the ability to leave that course open to the Board. We hold only that when a parolee requests a prompt hearing and decision, he is entitled to one.

We have noted that a parolee may have a substantial interest in focusing the revocation hearing on the conduct surrounding the violator warrant. When the violation is relatively minor, and he has exceptional references from his community, he may fear that delay in presenting the references will prejudice his case. If the parolee believes that incorrect adverse information has been lodged with the Board, he may conclude that a delay will prejudice his ability to challenge the information or to confront witnesses. Or, when the parolee has a strong case to avoid revocation, he may decide to try for an immediate decision in his favor so as to reduce the risk that prison behavior will prejudice his case.

funds whose outlay for transportation is delayed, but we believe any interest is *de minimis* at most and need not be seriously considered.

We repeat that an early decision adverse to the parolee-prisoner will not prevent the Board from later reconsideration in light of the record of the parolee-prisoner's interim institutional performance. If, however, the prisoner's interests are served by an early decision and whatever inertial force it carries, the reason for the Board's desire to avoid any decision prior to completion of the intervening sentence escapes us.

C. Conclusion

The result in this case is not strictly mandated by *Morrissey*, for missing from it is the interest of the parolee in avoiding unjustified incarceration, an interest the importance of which we have already stressed. Yet although the prisoner interests are of a different nature in this case, we believe that they are of substantial importance. They involve the fairness of procedures afforded individuals within the criminal process—fairness reflected in both the importance of presenting a full and accurate evidentiary record to the Parole Board and the symbolic importance of not unfairly leaving a prisoner uncertain about when he may expect to return to society. They involve the prisoner's interest in not having the denial of participation in rehabilitative programs or the debilitating effects of uncertainty about his future deprive him of the opportunity to rehabilitate himself in preparation for an orderly adjustment to the world outside. And while provision of a prompt hearing in these ways aids the prisoner, it also serves society by preserving the integrity of the criminal process and furthering the community goal of rehabilitation that, along with other objectives, is the very basis for invocation of the criminal sanction.

As or more important is the fact that the Parole Board has presented no reason of any force whatsoever to justify delaying a hearing that the parolee has re-

quested. For the question presented is not—as in *Morrissey*—whether due process requires a hearing not otherwise provided, but *when* a required hearing must be held. If there were Government arguments of substance as to why delay was necessary,⁴⁰ we would find this to be a harder case. But the asserted justifications for delay are so groundless as to make it clear that the due process clause requires a prompt hearing upon request.⁴¹

⁴⁰ Because our decision is grounded on considerations of due process, we reject the argument advanced by the Board that the applicable statutes do not grant the right to a hearing until the violator warrant has been executed. This argument proceeds as follows: 18 U.S.C. § 4207 provides that “[a] prisoner *retaken* upon a warrant issued by the Board of Parole, shall be given an opportunity to appear before the Board” (emphasis added), and the process of “executing” a warrant is defined in 18 U.S.C. § 4206 as “taking such prisoner and returning him to the custody of the Attorney General.” Although it is now understood that the “opportunity to appear before the Board” implies a timely opportunity, the statutory requirement arises only when the prisoner is retaken on the warrant, after completion of his intervening sentence.

We have no occasion to decide whether the lodging of a detainer suffices to “retake” the prisoner within the terms of the statute. The issuance of a violator warrant, as we noted in *Shelton v. United States Board of Parole, supra*, “triggers a process which, as a matter of fundamental fairness, must be pursued with reasonable diligence and with reasonable dispatch.” On the balancing of interests presented herein, we find constitutionally impermissible denial of the right to a prompt revocation hearing solely because of intervening incarceration.

⁴¹ We do not disturb our prior holding that the Board reasonably may await the outcome of criminal charges concerning the acts alleged in the violator warrant. *Shelton v. United States Board of Parole*, 388 F.2d 567 (1967).

We reserve, without deciding, the question whether a parole revocation hearing must be held within a reasonable time after a possible parole violation is brought to the Board’s attention.

The absence of a Government interest of any significance in delaying the hearing until the expiration of the intervening sentence also answers the possible suggestion that parolees should have to present some specific allegation or proof that delaying a hearing will cause prejudice before a hearing is required. Concededly, in some cases a parolee might be able to allege specifically that because of the detainer's being lodged, he is likely to be denied participation in rehabilitation programs, or the opportunity for early parole, in respect of his intervening sentence. And in some cases he may be able to gather the information necessary to make a showing that he will be prejudiced in presenting evidence of mitigating circumstances or good reputation that might influence the Board not to exercise its power to revoke parole. But in other cases the prisoner may have difficulty while under incarceration, and without any legal assistance, in comprehending the relevant issues and making out the kind of showing that would be prepared by a party who is at liberty and represented by counsel. Simply stated, this requirement may be unrealistic when considered against the circumstances of the prisoner. Moreover, it is not the case that a parolee will automatically have his parole revoked, after an intervening conviction, unless he can affirmatively establish some extenuating circumstances; rather, after the parolee presents evidence that he thinks will aid his case, the Board possesses broad discretion in deciding whether to revoke parole.

There are, furthermore, certain kinds of prejudice to prisoner interests that exist across the board and thus do not require case-by-case documentation. In every case the prisoner's interest in avoiding uncertainty will be implicated. In every case the prisoner might wish to be able to petition the sentencing judge on the intervening sentence, present to him the decision of the Board, and ask him to modify the sentence he imposed in light

of the Board's action. And in every case, there is a substantial possibility that delay will impair presentation of a full and accurate record to the Board, prejudice that may escape attempts at anticipation, discovery, and demonstration. These interests alone seem to us far more weighty than the chimerical interests asserted by the Government.

Finally, we note that a rule requiring demonstration of prejudice could result in undercutting the Board's interests by adding another layer to the hearing procedure. The Board would be required to give careful consideration to petitions alleging that the circumstances presented by each parolee-prisoner claiming a right to a hearing. *Pro se* petitions are often inartfully drawn, and fair and thorough consideration of whether particular prisoners should be granted a hearing would require considerable effort. Denials of requests for hearing would be subject to judicial review, and anyone familiar with the flood of habeas corpus petitions that are filed by prisoners will have little difficulty predicting that the Government would find itself having to defend against an enormous number of actions brought in District Court seeking to overturn the Board's denial of a hearing. If the District Court reverses, the hearing will have to be held in any event; if it affirms, still more proceedings may lie in the appellate court; and if the Government finally prevails, all of the effort required to do so will merely delay, not eliminate, the holding of a hearing. Thus, the suggestion that prejudice must be shown is not only both unrealistic and inconsistent with a careful consideration of the relevant private and Governmental interests, it is also likely to end up imposing at least as great a burden on the Government as the requirement of a hearing upon request.

IV. DECISIONS IN OTHER CIRCUITS

The issue addressed in this appeal has been considered by eight other courts of appeals. Six circuits have held that *Morrissey* does not require the Parole Board to provide a revocation hearing to a parolee convicted and incarcerated on an intervening charge prior to completion of the intervening sentence.

In *Small v. Britton*, 500 F.2d 299 (10th Cir. 1974), the Tenth Circuit reaffirmed its holding in *Simon v. Moseley*, 452 F.2d 306 (1971) that "while a revocation warrant must be executed within a reasonable time . . . incarceration in a state institution [is] . . . a good reason for delay in execution of the warrant." The court agreed with the Fifth Circuit that a parolee is not taken into custody until after a parole revocation warrant has been executed, and held that *Morrissey* rights are triggered only by execution of the detainer, rather than by its issuance:

As to [the final] . . . hearing the Court merely stated that it be afforded 'within a reasonable time after the parolee is taken into custody.' (Emphasis added). *Morrissey, supra*, at 488, 92 S. Ct. at 2604.

A federal parolee is not taken into custody until after the parole revocation warrant has been *executed*. *Accord*, *Cook v. United States Attorney General*, 488 F.2d 667 (5th Cir. 1974). 18 U.S.C.A. § 4207 provides that a parolee is entitled to a hearing only after he is "retaken upon a warrant." (Emphasis added). . . .

In summary, we conclude: (1) the *Morrissey* decision requires that a revocation hearing be held within a reasonable time after the parolee is taken into custody; (2) a parolee is not 'taken into custody' until the revocation warrant has been executed; (3) *Morrissey* does not require that a revocation warrant be executed immediately after it has been issued; and (4) incarceration in a state insti-

tution is a good reason for delay in the execution of a warrant.

500 F.2d at 301-02.⁴² We do not believe that the Court in *Morrissey* meant by the words "taken into custody"⁴³ to condition prisoners' due process rights on the technical requirement that a warrant be executed, when an unexecuted warrant may have a substantial impact on the prisoner against whom it is lodged. The Supreme Court did not consider the circumstance of a prisoner who already is in custody on another charge, and, while we agree that our result is not commanded by the language of the *Morrissey* decision, we also believe that it is the duty of this court to uphold a claim of right when it is supported by the balancing of interests approved in that decision.

In *Cook v. United States Attorney General*, 488 F.2d 667 (5th Cir. 1974), cert. denied, 419 U.S. 846 (1974), the Fifth Circuit based its decision that the Parole Board could wait until an intervening sentence was completed before holding a parole revocation hearing on the conclusion summarized above, namely, that "execution of the warrant is the operative factor in triggering the availability of the revocation hearing." *Id.* at 671. The court recognized that a detainer may cause anxiety, problems in rehabilitation, and denial of educational opportunities, but noted that the prisoner had

⁴² The Tenth Circuit's position was reaffirmed in *Moddy v. Daggett*, No. 75-1199 (10th Cir. May 7, 1975). In that case, the court, citing *Small v. Britton, supra*, denied a prisoner's petition for leave to proceed in forma pauperis. The Supreme Court has granted certiorari in that case. 44 U.S.L.W. 3493 (U.S. Mar. 1, 1976) (No. 74-6632).

⁴³ Although the Tenth Circuit has concluded that a parolee is not in custody for purposes of 18 U.S.C. § 4207 (1970), it nevertheless recognizes that a parole violator warrant lodged as a detainer represents sufficient custody for purposes of habeas corpus jurisdiction. *Small v. Britton, supra*.

not demonstrated actual prejudice from the six-year delay prior to his revocation hearing, and chose to defer to the administrative expertise of the Parole Board."

"The Court reasoned as follows:

In concluding that the deferral of the hearing did not deprive Appellee of any rights prescribed by *Morrissey*, we emphasize that Appellee has not shown that he was prejudiced by the delay....

Appellee also contends that he was prejudiced during the term of his intervening sentence in that the presence of . . . a detainer results in the deprivation of certain prison privileges such as trustee status and various educational opportunities. We are unable to conclude on this record that the extent of such deprivation is so great or so unreasonably related to the very existence of a detainer—based as it is in this case on a serious and incontestable parole violation—as to require that the revocation hearing be held at the commencement of the intervening sentence....

Appellee also asserts that the deferral of the revocation hearing coupled with the presence of the detainer caused him great anxiety and interfered with the rehabilitation process since it is difficult for a parolee to become motivated while laboring under the uncertain prospect of further imprisonment following completion of his current sentence. We are simply unqualified, unauthorized, and unwilling to second guess the Parole Board on a matter so peculiarly within its own expertise.

We do not close our eyes to the fact that Appellee may have been disadvantaged in certain respects by the deferral of the revocation hearing but we are unable to conclude that the disadvantage constitutes such a grievous loss—in due process terminology—as to require the hearing be held prior to service of the intervening sentence or to permit the intrusion by a Court into this highly discretionary activity.

488 F.2d at 673.

The *Cook* holding was reaffirmed in *Trimming v. Henderson*, 498 F.2d 86 (5th Cir. 1974), cert. denied 420 U.S. 931 (1975).

We cannot concur with either the Fifth Circuit's conclusion as to the balancing of interests or as to the degree of deference which must be shown actions of a parole board. The Board has presented no substantial interests to justify the delay of revocation hearings until the completion of intervening sentences, and when the issue is presented in that posture we cannot deny relief on a general claim of "agency expertise." In *Hysler v. Reed*, 318 F.2d 225, 240 (1963), cert. denied sub. nom. *Jamison v. Chappell*, 375 U.S. 957 (1963), this court stated a principle we affirm without hesitation, that "the exercise of discretion in determining whether or not parole should be revoked . . . represents a very high form of expert regulatory and administrative judgment and the expert appraisal of the Parole Board in this area can be regarded as almost unreviewable." Our unwillingness to intrude into the Board's decision on the disposition of a parole violation, cited with approval by the court in *Cook*,⁴⁵ did not constrain the *Hysler* court from reviewing the procedures used by the Board in conducting preliminary interviews, or from establishing requirements therefor. So in the instant case, where it appears that a procedure regularly employed by the Board results in substantial harm to parolees for no countervailing purpose, we cannot countenance the continuance of the practice on an unelaborated claim of "administrative expertise."

The Fourth Circuit joined the Fifth and Tenth in *Gaddy v. Michael*, 519 F.2d 669 (1975), petition for cert. filed, (Aug. 5, 1975) (No. 75-5215) also upholding the rule that when a warrant has been properly issued within the maximum term of the original sentence, the execution of the warrant may be held in abeyance during the service of an intervening sentence. We read the Fourth Circuit's decision, however, to be sufficiently flexible so as

⁴⁵ 488 F.2d at 673 n.13.

not to preclude agreement with our result in the proper fact situation.

In *Gaddy*, the court of appeals rejected a strict rule that the Parole Board must hold and dispose of a revocation hearing within two months of the issuance of a parole violator warrant. Gaddy never objected to the delay in executing his warrant, *id.* at 678, and the court refused to grant relief on delay alone,⁶⁶ reasoning that he "could not 'sleep on his administrative remedies for fear that he has no case and then claim prejudice by reason of the passage of time.'" *Id.*

The most recent of this group of cases is the Ninth Circuit's decision in *Reese v. United States Board of Parole*, No. 74-2418 (January 12, 1976). *Reese* affirmed the denial of relief to two prisoners who had been denied parole revocation hearings during intervening sentences, and who petitioned that the warrants be quashed for unreasonable delay. The court noted that neither *Morrissey* nor the pertinent statute (18 U.S.C. § 4207) expressly requires a prompt hearing in the intervening sentence situation, then argued that the prisoners did not have a substantial due process interest in prompt hearings.

The *Reese* court discussed prisoner interests in prejudice from loss of evidence and from the inability to present mitigating factors, and rejected them as insubstantial. As to the first, it was argued that when a parolee is convicted of a crime committed on parole, "[t]he parole officer is then fairly entitled to assume that all evidence upon which the parolee was legally entitled to rely was presented and considered." Slip opinion at p. 5. This, as we have noted above, simply is not the case. The Parole Board considers a very broad range of evidence in the

⁶⁶ See slip opinion pp. 45-47 *infra* for our discussion of the issue whether delay alone justified quashing the warrants in this case.

parole revocation decision, much of which would be irrelevant or inadmissible at a criminal trial—the parolee is “legally entitled to rely” on evidence which has no bearing on the conviction itself but which supports his argument that parole should not be revoked despite his conviction. The prisoner’s interest in presenting mitigating evidence was brushed aside with the comment that “there are few, if any, suffering penal confinement who do not find such circumstances to explain their own plight,” and with the notation that the prisoners’ petitions had not identified mitigating evidence they intended to present. The Ninth Circuit’s repudiation of the parolee’s interest in presenting mitigating evidence disregards both (1) the recognized distinction between the Board’s determination that a violation has occurred and its determination whether to revoke parole and (2) the Supreme Court’s clear statement in *Gagnon v. Scarpelli* that even when a parole or probation violation is undisputed, the violator may have a sufficient case in mitigation of the violation to deserve appointment of counsel at a revocation hearing.⁴⁷

⁴⁷ Judge Duniway filed a dissenting opinion in the *Reese* case in which he endorsed the positions taken by the Seventh and Eighth Circuits, discussed below. On the importance of evidence in mitigation of the offense, Judge Duniway responded to the majority as follows:

It is not for us to assume, as the majority opinion does, that a hearing in these cases would be a waste of time because we can conceive of no mitigating circumstances in these cases that would justify lifting the detainer or executing it so as to make the remaining parole term concurrent with the new term. Our discretion is not involved, nor are our notions as to what mitigating circumstances may exist. The discretion belongs to the Board of Parole; so does the decision as to whether there are mitigating circumstances and, if so, what are to be the consequences. . . . Under these circumstances, we have no way of knowing whether the failure to hold a hearing was ‘prejudicial.’ To decide that question, we

The parolee's interests in certainty, access to rehabilitation programs, and the possibility of earlier release were not considered by the *Reese* majority. Judge Duniway, writing in dissent, emphasized the importance of these omitted factors:

A detainer can be, and usually is, detrimental to the prisoner. It is, or can be, held against him by the prison authorities and the parole authorities of the jurisdiction where he is imprisoned. It may result in loss of valuable privilege, and in having to serve his full terms in prison when he would otherwise have been released. . . . Moreover, the United States Board of Parole has discretion as to whether to revoke parole at all for a violation and also as to the terms it will impose if it does revoke parole. Not every parole violation, even one based on conviction of an offense while on parole, results in parole revocation. . . . If a prompt hearing is held, the detainer may be lifted. Alternatively, the board may decide to 'execute' the warrant, so that the parolee can serve his reinstated time concurrently with the time that he is serving under the new conviction.

Slip Op. at p. 10. The majority did not base its decision on countervailing interests of the Parole Board; it did no more than assert that the parolee's interests were unimportant and better left to the "coordinated plan of the United States Board of Parole." *Id.* at 7.

The Third and Sixth Circuits have affirmed by order district court opinions which denied a right to a prompt revocation hearing. In *Colangelo v. United States Board of Parole*, No. 75-1249 (6th Cir. July 16, 1975), *aff'g* Civ. No. C 74-251 (N.D. Ohio Dec. 11, 1974), the District Court had held that *Morrissey* did not require a revoca-

would have to guess what the Board might have done if it had had a hearing. If due process requires a hearing, its denial is prejudicial.

Slip Op. at p. 11.

tion hearing prior to completion of an intervening sentence, relying in part on *Cook v. United States Attorney General, supra*. In *Orr v. Saxbe*, No. 75-1042 (3d Cir. June 17, 1975), *petition for cert. filed* (Oct. 10, 1975) (No. 75-5594), *aff'g* Civ. No. 74-341 (M.D. Pa. Nov. 27, 1974), the Third Circuit affirmed a conclusion that the presence of a federal parole violator warrant had not caused such a "grievous loss" to the parolee when lodged against him at a Massachusetts state prison as to require a revocation hearing prior to completion of his Massachusetts sentence.

The Seventh and Eighth Circuits have reached conclusions substantially similar to our own. In *United States ex rel. Hahn v. Revis*, 520 F.2d 632 (7th Cir. 1975) (mandate withdrawn),⁴⁸ the parolee repeatedly had requested that the Parole Board hold a revocation hearing during his intervening sentence, noting that both federal and state judges had recommended that his sentences be served concurrently. The court adopted the Eighth Circuit's conclusion that the effects of a detainer were sufficient to constitute "grievous loss," citing the following grounds:

We recognize that a detainer may result in a loss of privileges while a prisoner is serving a sentence, and that it may substantially diminish the prisoner's prospects for parole. . . .

Other elements of grievous loss, resulting from the outstanding detainer and the delay in the opportunity to remove it, include impairment of rehabilitation, possible prejudice in opportunity to defend

⁴⁸ Shortly after the Seventh Circuit announced its decision in *Revis*, the Government filed a motion asking that court to recall its mandate on the ground that given a conflict among the circuits it was not unlikely that the Supreme Court would grant a petition for certiorari in *Gaddy v. Michael, supra*, to consider the very issue decided in *Revis*. The motion was granted on August 27, 1975. No. 74-1057 (Fairchild, C.J.).

against charge of violation or to demonstrate mitigating circumstances, and risk of a longer total period of imprisonment.

Id. at 637. The *Hahn* court found a strong showing of prejudice in that the parolee had been denied the opportunity to persuade the Parole Board to execute his warrant and to allow the sentences to run concurrently. Even though it was expressly recognized that the Parole Board, after deciding to revoke parole, retained the discretion to delay execution of the warrant until the completion of the intervening sentence (thereby denying concurrent running of the sentences), the Seventh Circuit concluded that due process required that the parolee be given a timely opportunity to attempt to influence the Board:

Obviously there is no point in relitigating the fact that a violation occurred. Yet it is not a foregone conclusion that parole will be revoked. . . . This is true even when the violation involves serious criminal conduct. . . . Accordingly, notwithstanding incarceration for another offense, the violator has a substantial interest in presenting facts in mitigation of the violation that would influence the Board either to set aside the violation warrant or execute it giving him the benefit of concurrent sentences.

In 1973 the Eighth Circuit held that the punitive effects of a detainer lodged against a prisoner because of a pending parole revocation proceeding in another state violate a parolee's due process rights if the latter state refuses to determine the question of revocation until the prisoner completes his intervening sentence. *Cooper v. Lockhart*, 489 F.2d 308. In the more recent case of *Cleveland v. Ciccone*, 517 F.2d 1082 (1975), the court went beyond *Cooper* to hold that "federal prisoners are entitled to reasonably prompt hearings on federal parole or release violation warrants and . . . the heretofore frequent practice of deferring such hearings until the

expiration of an inmate's intervening sentence violates due process of law." *Id.* at 1083. It was noted that the Fifth and Tenth Circuits had held that no statutory right to a hearing arises until after execution of the warrant has occurred, but the court held that the due process requirements of *Morrissey* and *Wolff* required independent consideration of the interests involved:

The possibility that parole may not be revoked after the hearing, or that, if parole is revoked, the original term may be served concurrently with the intervening sentence, the impact of a delayed hearing upon the prisoner's rehabilitation, as well [as?] the potential loss of evidence that may occur during a long delay, are all important interests now firmly recognized in the balancing process which due process entails.

Id. The court found further support for its rejection of the "technical distinction" made by the Fifth and Tenth Circuits in the Supreme Court's holding in *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (on facts otherwise inapplicable to the present case), that "[a] fundamental requirement of due process is 'the opportunity to be heard' . . . *It is an opportunity which must be granted at a meaningful time and in a meaningful manner.*"

We concur with the conclusion of the Seventh and Eighth Circuits that a parolee-prisoner is denied his due process right to a hearing "at a meaningful time and in a meaningful manner" if, over his objection, the hearing is not held until the completion of his intervening sentence.

V. REMEDIES

The delay attendant upon the failure to provide the hearings requested in these cases raises the question whether it was either necessary or appropriate to quash

the parole violator warrants by reference to the fact of delay alone, as did the District Court. This court has already indicated that in answering that question "actual prejudice *vel non* [should be] the focal point of the inquiry." *Shelton v. United States Board of Parole*, *supra*, 388 F.2d at 574. We specifically noted in *Shelton* that "delay will not in and of itself suffice to show prejudice, except in extreme circumstances. *Id.* See *Cleveland v. Ciccone*, *supra*, 517 F.2d at 1089 ("Absent a showing of demonstrated prejudice severe enough to render the revocation hearing itself inadequate in terms of relief, we cannot say that the warrants should have been quashed or other habeas relief granted to preclude revocation of the paroles involved in this case."").

We therefore vacate the judgments quashing the warrants and remand the cases to the District Court to provide appellants with an opportunity to show that they have suffered actual prejudice in their attempts to adduce mitigating evidence and testimony and that they are thus entitled to have their parole violator warrants quashed.⁴²

If the District Court determines that an appellant has failed to prove actual prejudice, the case should be returned to the Parole Board with directions to hold a

⁴² Our reliance on demonstrated prejudice as a factor favoring quashing the warrant is not inconsistent with our earlier observation that prejudice is often difficult to demonstrate and that therefore a prompt hearing is necessary to ensure that the determination reflects a full and accurate presentation of all relevant evidence. That observation illustrates the importance of holding a prompt hearing, the failure to do which in the future is amenable to the remedy of a judicial direction that a hearing be held. The remedy of quashing intrudes on Government interests much more severely than the remedy of providing the hearing, for it deprives the Government of its normal discretion in parole matters.

hearing⁵⁰ within a reasonable time.⁵¹ See *Gagnon v. Scarpelli*, *supra*, 411 U.S. at 791; *Morrissey v. Brewer*, *supra*, 408 U.S. at 490. In that respect, we adhere to our ruling in *Shelton*, *supra*, that the Board too, in deciding whether to revoke parole, must "take into consideration the unavailability of mitigating evidence and testimony occasioned by its delay in holding the revocation hearing and a proffer as to what evidence or testimony appellant could have adduced but for the delay." 388 F.2d at 574.

It is so ordered.

⁵⁰ The structure of the hearing should be based upon the structure of the revocation hearing outlined in *Morrissey*, see 408 U.S. at 489, as amplified by more recent decisions of the Supreme Court and this court.

⁵¹ A "reasonable time" in this instance may, of course, reflect any realistic difficulties encountered in dealing with a temporary increase in the number of hearings which must be conducted following this opinion.

NO. 75-1042

State of New York

Court of Appeals

2 No. 216
In the Matter of Gregory Beattie,
Respondent,
vs.
The New York state board of
Parole,
Appellant.

OPINION

This opinion is uncorrected and subject to revision
before publication in the New York Reports.

(216) Louis J. Lefkowitz, Attorney-General (David
L. Birch and Samuel A. Hirshowitz of counsel)
for appellant.

Joel H. Golub, William E. Hellerstein and
Donald H. Zuckerman for respondent.

PER CURIAM:

The issue is whether a parolee held on an unrelated criminal charge is entitled to a prompt final revocation hearing. The answer is that he is.

Preliminarily, the appeal, as has been suggested, should not be dismissed for mootness in view of relator's subsequent conviction of the crime for which he had been charged. Even if the issue be mooted, the appeal should not be dismissed as moot if a question of general interest and substantial public importance is likely to recur (People ex rel. Guggenheim v. Mucci, 32 NY2d 307, 310; accord, e.g., Matter of Jones v. Berman, 37 NY2d 42, 57; East Meadow Assn. v. Bd. of Educ., 18 NY2d 129, 135). Such a recurring question is involved.

Although there is no fixed time within which a final parole hearing is required, the Parole Board is nevertheless required to hold such hearing within a reasonable time (Correction Law, §212, subd 7; see, e.g., Morrissey v. Brewer, 403 US 471, 488; People ex rel. Allah v. Warden, 47 AD2d 485, 487; Matter of McLucas v. Oswald, 40 AD2d 311, 315). Despite conclusive cause to believe a condition of parole has been breached, the parolee is entitled to a final revocation hearing, with the right to counsel, because of the divers factors which may influence the parole decision in fixing the period, if any, to be served under the prior unexpired sentence (see People ex rel. Donahoe v. Montanye, 35 NY2d 221, 226).

Of course, the parolee, in order to receive a hearing, must be in the custody of a correction facility as an inmate in connection with which the parole board has parole jurisdiction (cf., People ex rel. Petite v. Follette, 24 NY2d 60, 64). In this case, there was such custody and it is immaterial that the technical form of the custody was by virtue of temporary detention due to inadequate detention facilities in the city of New York (People ex rel. Allah v. Warden, 47 AD2d 485, 487-488, supra). The fact is that the parolee was in a place subject to the convenience and practical control of the Parole Board.

The view urged and taken in some Federal cases that a parolee, still under unrelated charges, should not be compelled to consider waiving his privilege against self-incrimination in the parole hearing is insubstantial (see, e.g., Burdette v. Nock, 480 F2d 1010, 1012; Avellino v. United States, 330 F2d 490, 491, cert. den. 379 US 922). That is the parolee's choice with the advice of counsel. If he wishes he may waive the hearing or seek its adjournment but where he demands a hearing, as here, he is entitled to it.

Moreover, although probably never required, relator established a plausible basis for prejudice. It would have been futile to have posted bail, fixed at \$1500, in the unrelated criminal proceeding, because